

Supplement to the Wisconsin

Statutes

Vol. 10

**COMMERCE AND MANUFACTURING
TARRANT AINELLAND**

WISCONSIN DEPARTMENT OF TAXATION

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN

FROM JANUARY 1, 1901

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

MINNESOTA MINING AND MANUFACTURING
COMPANY, APPELLANT,

vs.

WISCONSIN DEPARTMENT OF TAXATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX.

	Original	Print
Proceedings in Supreme Court of Wisconsin.....	1	1
Order allowing appeal and fixing bond.....	1	1
Petition for allowance of appeal, assignments of error and prayer for reversal.....	2	1
Appeal bond..... (omitted in printing) ..	58	
Citation..... (omitted in printing) ..	61	
Praecipe for transcript of record.....	84	4
Caption..... (omitted in printing) ..	86	
Record from Circuit Court of Dane County.....	87	5
Notice of appeal to Supreme Court of Wisconsin.....	87	5
Proceedings before Board of Tax Appeals of Wisconsin.....	88	6
Testimony of Herbert D. Kuentz.....	88	6
Herbert P. Buetow.....	107	21
Exhibit 1—Excerpts from proceedings before Wis- consin Tax Commission in matter of appeal of Minnesota Mining & Mfg. Co.....	136	45
Caption and appearances.....	136	45
Testimony of Herbert B. Buetow.....	139	45
Exhibit 5—Second revised computation of taxes for 1935-1936.....	161	63
Exhibit 9—Second revised computation of taxes on dividends for 1937.....	169	67
Exhibit 13—Second revised computation for taxes on dividends for 1938-1940.....	177	71
Exhibit 14—Stipulation of facts.....	185	76
Decision and order.....	194	80

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1944.

Record from Circuit Court of Dane County—Continued	Original	Print
Notice of appeal from Wisconsin Board of Tax Appeals.	199	83
Decision of Court	216	97
Judgment	218	99
Excerpts from appellant's brief	221	100
Argument and submission	222	101
Judgment	223	102
Opinion, Wickhem, J.	225	102
Motion for rehearing	230	105
Order retaining record	231	106
Order denying motion for rehearing	232	106
Opinion on rehearing	234	106
Certificate of clerk	235	
Statement of points to be relied upon and designation of parts of record to be printed	236	107
Order noting probable jurisdiction	240	110

[fol. 1] **SUPREME COURT OF THE UNITED STATES**

[File endorsement omitted]

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Appellee**ORDER ALLOWING APPEAL AND FIXING BOND—Filed December 11, 1943**

The petition of Minnesota Mining & Manufacturing Company, appellant in the above-entitled matter, for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin and the Assignments of Error filed therewith and the record in said cause having been considered;

It Is Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin as prayed in said petition and that the clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record and proceedings in the above-entitled cause and transmit the same to the Supreme Court of the United States within 40 days from the date hereof.

It Is Further Ordered that the Appellant, Minnesota Mining and Manufacturing Company, execute to Wisconsin Department of Taxation, Appellee, its bond with surety to be approved by the undersigned, in the sum of One Thousand (\$1,000.00) Dollars, conditioned according to law.

Dated this 11th day of December, 1943.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 2] **SUPREME COURT OF THE UNITED STATES**

[Title omitted]

Petition for Allowance of Appeal, Assignments of Error and Prayer for Reversal—Filed December 11, 1943

The above-named Minnesota Mining & Manufacturing Company, a Delaware corporation, considering itself aggrieved by the decision and final judgment of the Supreme

Court of the State of Wisconsin rendered on June 16, 1943, motion for rehearing of the decision and judgment therein having been denied on September 14, 1943 in the above-entitled cause, which said decision and judgment affirm the judgment of the Circuit Court for Dane County, Wisconsin, which in turn affirmed certain assessments for taxes made by the Wisconsin Department of Taxation, and held the law under which said assessments were made constitutional, although there was drawn in question the constitutionality of said law and assessments as applied to appellant under the Fourteenth Amendment to the Constitution of the United States of America, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United States herein to the end that said decision and judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of bond required of appellant herein on such appeal.

[fol. 3]

ASSIGNMENTS OF ERROR

The said appellant assigns the following errors in the record and proceedings of the Supreme Court of the State of Wisconsin:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935, and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, as applied to Minnesota Mining & Manufacturing Company and its stockholders under the existing facts was invalid as in conflict to the Fourteenth Amendment to the Constitution of the United States of America as imposing a tax beyond the taxing jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this proceeding pursuant to the provisions of Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935 and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937 and Chapter 198 of Wisconsin Session Laws, 1939, against the Minnesota Mining & Manufacturing Company, a Delaware corporation, under the existing facts, constituted a

deprivation of property of Minnesota Mining & Manufacturing Company and its stockholders without due process of law and beyond the taxing power of the State of Wisconsin and therefore invalid as violative to the Fourteenth Amendment to the Constitution of the United States of America.

(3) The Supreme Court of Wisconsin erred in failing to hold (split decision of State Supreme Court three to three which by rule of Wisconsin Supreme Court affirmed the trial court's decision) that Section 3, Chapter 505, Wis. [fol. 4] consin Session Laws, 1935, (as amended by Chapter 552, Wisconsin Session Laws, 1935), and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, so far as it purports to reach Wisconsin earnings of Minnesota Mining & Manufacturing Company without reference to the year in which they were earned, and for many years prior to the enactment of the law and from the time the corporation first operated in Wisconsin, are invalid as depriving the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and therefore to this extent invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

For these errors the said appellant prays that the judgment of the Supreme Court of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in the appeal to the Supreme Court of the State of Wisconsin to the tax assessments complained of.

John L. Connolly, Post Office Address: 900 Fauquier Avenue, St. Paul, Minnesota.

S. Bergen Ela, Post Office Address: 1 West Main Street, Madison 3, Wisconsin, (Attorneys for Appellant.)

[fol. 5-83] [File endorsement omitted.]

[fol. 84]

[File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING THE PORTIONS OF THE RECORD TO BE
INCORPORATED INTO THE TRANSCRIPT—Filed December 27,
1943

To the Honorable Arthur A. McLeod, Clerk of Supreme
Court of Wisconsin.

SIR:

You will please prepare a transcript of the record in the
above-entitled matter to be submitted to the United States
Supreme Court in pursuance to an appeal heretofore taken
in this case and include therein the following:

That part of the transcript of testimony before the Wis-
consin Board of Tax Appeals contained on Record Pages
51-107.

That part of Exhibit 1 attached to transcript of testi-
mony appearing on Record Pages 385-415. (Omitting tes-
timony with respect to Baeder-Adamson loss.)

Exhibit 5, being second revised computation of taxes for
1935-1936.

Exhibit 9, being second revised computation of Taxes on
dividends for 1937.

Exhibit 13, second revised computation for taxes on
dividends for 1938-1940.

Exhibit 14, partial stipulation of facts.

Decision and Order of Wisconsin Board of Tax Appeals
(Record 21-26).

Notice of Appeal from Wisconsin Board of Tax Appeals
to Circuit Court for Dane County. (Omitting decision and
order of Board of Tax Appeals attached.)

[fol. 85] Decision of Circuit Court of Dane County (Rec-
ord 499-500).

Judgment of Circuit Court for Dane County (Record
504-506).

Notice of Appeal to Supreme Court of State of Wiscon-
sin. (Omitting exhibits attached because pertinent ex-
hibits already included.)

Excerpts from appellant's brief in Supreme Court of Wisconsin, being question 1 of issues involved on appeal at Page 2 of brief, Heading I at page 14 of Brief, and Heading IV at Page 50 of brief.

Decision and Judgment of Supreme Court of the State of Wisconsin.

Motion for rehearing on Decision and Judgment of Supreme Court of State of Wisconsin.

Decision and Judgment on rehearing in Supreme Court of the State of Wisconsin.

Petition for Appeal to United States Supreme Court, Assignments of Error, and Prayer for Reversal.

Order Allowing Appeal and Fixing Bond.

Bond on Appeal and Order Approving Bond.

Statement as to Jurisdiction on appeal to United States Supreme Court.

Citation on Appeal to United States Supreme Court.

Service of Appeal Papers and Statement directing appellee's attention to Rule 12.

Affidavit of Service of appeal papers and Citation.

This Praecipe.

Dated this 17th day of December, 1943.

John L. Connolly, G. Burgess Ela, Attorneys for Appellant.

Personal service of the above praecipe admitted this 17th day of December, 1943.

John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Assistant Attorney General, Attorney for Appellee.

[fol. 86]

[Caption omitted]

[fol. 87]

IN CIRCUIT COURT OF DANE COUNTY

MINNESOTA MINING AND MANUFACTURING COMPANY, a Foreign Corporation, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

NOTICE OF APPEAL

You Will Please Take Notice that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant

in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the order and judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 2nd day of September, 1942 in favor of the respondent and against the appellant, confirming an order and decision of the Wisconsin Board of Tax Appeals dated February 13, 1942 and an assessment and tax referred to therein, and from the whole of said order and from the whole of said judgment.

A copy of said order and judgment appealed from is hereto annexed.

Dated, September 22, 1942.

Ela, Christianson & Ela and John L. Connolly, Attorneys for Appellant.

To: John E. Martin, Esq., Attorney General of State of Wisconsin. Harold H. Persons, Esq., Asst. Attorney General of State of Wisconsin. Clerk of Circuit Court for Dane County, Wis.

[fol. 88] BEFORE BOARD OF TAX APPEALS OF WISCONSIN

PORTIONS OF TRANSCRIPT OF TESTIMONY

HERBERT D. KUENTZ, a witness in behalf of the respondent, having been first duly sworn, testified as follows:

Mr. Teschner:

Q. Will you please state your full name for the record, Mr. Kuentz?

A. Herbert D. Kuentz.

Q. And are you a graduate of the University of Wisconsin?

A. I am.

Q. What degree do you hold?

A. B. A.

Q. What course did you pursue?

A. The commercial course.

Q. And what did you major in?

A. I majored in accounting.

Q. And what is your position with the department of taxation?

A. I am chief accountant with the income tax division of the department.

Q. And are you a certified public accountant?

A. I am.

Q. And how long have you been a certified public accountant?

A. Approximately twelve years.

[fol. 89] Q. And how long have you been with the department of taxation or its predecessor, the tax commission?

A. Approximately twenty-four years.

Q. And are you familiar with the administration of the privilege dividend tax law?

A. I am.

Q. And have you been familiar with it since its passage in 1935?

A. I have.

Q. And have you been concerned with its administration constantly during that period?

A. Yes, I have.

Q. And approximately how many corporations are there which are organized under the laws of states other than Wisconsin that report their income for taxation in Wisconsin?

Mr. Ela: We object to the materiality of that question.

Mr. Teschner: It goes to his qualifications to show his experience.

Mr. Ela: If it is based on that, I withdraw my objection.

A. There are approximately 1900 corporations organized in other states that report their income for taxation in Wisconsin.

Q. Mr. Kuentz, are you familiar with the privilege dividend tax matters involving the petitioner corporation here, the Minnesota Mining and Manufacturing Company?

A. I am.

Q. And did you supervise and direct a recomputation of that company's privilege dividend tax liability after the Wisconsin supreme court had filed its decision in the J. C. Penney and related cases?

A. I did.

[fol. 90] Q. And did you start that immediately upon receipt of the record in the Minnesota Mining Company case upon receipt from the circuit court of Dane County?

A. I did.

Q. And was the computation of the privilege dividend tax liability of the petitioner involving dividends paid dur-

ing the period 1935 and 1936 based upon the statutory presumption that dividends are paid out of earnings of the previous year?

A. The original computation which is involved in the record which went before the supreme court was based upon that assumption.

Q. That is the one I am speaking of. In recomputing the tax liability after the remand from the supreme court, what basis did you use?

A. The basis used then was the analysis of the surplus account to determine what portion thereof was represented by accumulated earnings in Wisconsin to the total accumulated earnings.

Q. And did you treat a dividend as having been paid out of the surplus of the corporation at the close of the year preceding the payment of the dividend?

A. Yes.

Q. And why did you do it that way?

A. That is my understanding of what the supreme court directed us to do, and it was taken from the surplus of the corporation as of the close of the preceding year, because we have no other time during the year on which we have a surplus balance.

Q. Now, did the methods you pursued necessitate an analysis of the petitioner's surplus account from the date it started doing business in the state of Wisconsin?

A. Yes; it did.

[fol. 91] Q. What was the privilege dividend tax liability for the years 1935 and 1936 as originally made before the case went to the supreme court?

Mr. Ela: I object to that as being wholly immaterial, what happened before; the amount of computation has nothing to do with the present computation.

Mr. Slater: That would appear from the present exhibits any way?

Mr. Ela: It appears from the present exhibits; furthermore, it is admitted that was computed on the wrong basis.

Mr. Conway: That can do no harm.

Mr. Teschner: It will prove helpful in understanding a subsequent explanation and it is really leading up to it. It is repeated here for the convenience of the board and the courts.

Mr. Conway: We will receive it subject to the objection.

A. The additional tax exclusive of interest as shown by Exhibit 1, I believe this is, and as per the assessment notice dated January 4th, 1939, is \$5471.06. That is exclusive of penalty and interest.

Q. Now, Mr. Kuentz, what is the privilege dividend tax liability presently claimed by the respondent, by using the surplus analysis method, for those same years, and I refer you to Exhibit 5?

A. The privilege dividend tax liability for the same period per Exhibit 5 exclusive of interest and penalty is \$2220.66.

Q. Now, Mr. Kuentz, you have heard this morning that three cases were consolidated on motion of the respondent, and is the liability in each case based upon the same analysis and method used in the case remanded from the supreme court?

A. Yes. Exhibit 9 and Exhibit 13 are merely a continuation of the analysis reflected in Exhibit 5.

[fol. 92] Q. Now, Mr. Kuentz, as a certified public accountant, will you give us a standard and commonly accepted definition of corporate surplus?

Mr. Ela: Your Honor, I object to that as calling for a conclusion of the witness. That isn't even in the field of expert testimony, because after all we are dealing with the standard which attempts to impose some sort of a tax.

Mr. Teschner: This witness has been qualified as an expert and he is asked to express that which is within his knowledge.

Mr. Slater: I assume we may or may not follow his conclusions, and we can at least have the benefit of them.

Mr. Ela: I merely want our objection noted.

The Witness: The surplus of a corporation is ordinarily defined as the excess of the net assets of the corporation over its capital stock, its outstanding capital stock.

Q. Now, did you consult any recognized accounting authorities to check on your definition?

A. I did.

Q. And what authorities did you consult?

A. I consulted Accountant's Handbook written and published by Robert H. Montgomery; one by W. A. Paten, Professor of accounting at the University of Michigan, and E. A. Saliers, professor of accounting at the Northwestern University.

Q. Mr. Kuentz, how is the surplus account of a corporation built up? By that I mean, what credits are made to a surplus account?

Mr. Ela: You mean of a corporation generally now or of this corporation?

Mr. Teschner: I am speaking of a corporation generally. I am asking him as an expert.

A. The ordinary credits to the surplus account are the net profits or net earnings of a corporation. There may be [fol. 93] credits resulting from the sale of its capital stock in excess of face value or par value thereof. There may be surplus created by the donation by the stockholders. Sometimes surplus arises through the profit on the sale of capital assets but ordinarily that goes through the profit and loss account. You may have surplus arising as a result of a re-valuation of capital assets.

Q. Mr. Kuentz, how is a surplus account generally depleted? By that I mean, what charges are made against it?

A. The ordinary charges to the surplus account are the dividends paid by the corporation, the net losses incurred by the corporation for the year or years. The loss from the sale of capital stock at less than its face or par value, and you may also have charges to surplus resulting from a re-valuation of capital assets due to appraisals.

Q. Now, Mr. Kuentz, is it possible that a corporation—and I am not speaking of any particular corporation—that its surplus may be entirely tied up in fixed assets used in the corporate business, such as land, buildings or machinery?

A. That is possible.

Q. If you assume that a corporation's surplus is so tied up in fixed assets, would that be reflected upon the corporation's balance sheet?

A. Yes, if the balance sheet were properly prepared, that fact would be reflected in the balance sheet.

Q. And would you give us an example of how that would be reflected?

A. You might have a balance sheet showing land of \$25,000, buildings of \$25,000, and machinery of \$50,000, making a total balance sheet footings of \$100,000, and on the credit side you might have the capital stock of \$50,000 and surplus of \$50,000.

[fol. 94] Q. Now, assuming such statement of facts existed, could such a corporation declare and pay a dividend?

Mr. Ela: Again I take it you are talking generally because we have the laws of 48 states with the statutes different in each state, and I submit this witness isn't qualified to give an answer generally applicable to all corporations.

Mr. Slater: I don't know what good the answer would do, as far as our record is concerned unless we had it tied up with some specific statement.

Mr. Teschner: I have suggested an assumed statement of facts.

Q. Mr. Kuentz, in addition to the facts I have assumed, will you assume this corporation did business in the state of Delaware, and answer the question.

A. You mean, organized under the—

Q. Under the laws of the state of Delaware is what I meant to say, yes.

A. Well, from my knowledge of the law of the state of Delaware, it could pay a dividend.

Mr. Ela: Well now, I just want the record to show we are objecting to testimony by this witness of what the laws of Delaware are.

Mr. Teschner: The laws of Delaware have been stipulated in this record.

Mr. Ela: There is no question about that.

Mr. Teschner: Is there a question that the witness knows what the law of Delaware is? I can establish that, that he knows that, if that is your objection.

Mr. Ela: I don't think Mr. Kuentz claims to be qualified as passing on the effect of the Delaware corporation laws. It seems to me that is a function for this board to determine. I want the record to show that objection to that line of questioning.

[fol. 95] Mr. Slater: We will have to do that that way, whether Mr. Kuentz answers the question.

Mr. Teschner: Yes, I know that, but I believe I have the right to have it in the record.

Mr. Ela: I take it, the record shows our objection, and that it is admitted subject to that objection. Is that correct?

Mr. Conway: Yes.

The Witness: From an accounting standpoint that corporation could pay a dividend even though its entire surplus was represented on its balance sheet by the fixed assets, but it would necessitate the borrowing of cash at the bank in order to pay the dividend in cash.

Q. Mr. Kuentz, will you differentiate between the surplus account of the ordinary corporation and its surplus funds?

Mr. Ela: I take it all this testimony from now on will be admitted subject to our objection. Am I correct in that, your Honor, as to the materiality or relevancy or competency?

Mr. Conway: That is all right, you have entered your objection and we have ruled.

Mr. Ela: Yes, I appreciate that. There are further questions.

Mr. Slater: It will be a continuing objection.

Mr. Ela: That is correct.

The Witness: Will you repeat the question?

(Question read by the reporter).

A. Surplus funds in accounting terminology usually refers to cash on hand which is not at the time necessary in the operation of the business, whereas the surplus of a corporation or the surplus account as I defined it before, is the excess of the net assets of a corporation over its capital stock.

Q. Are the two terms synonymous?

A. They are not.

[fol. 96] Q. Now, Mr. Kuentz, you have already testified that you supervised an analysis of the surplus of the Minnesota Mining Company and the recomputation of its privilege dividend tax liability. What period did this analysis cover? You may refer to any of the exhibits.

A. It covered the entire period from January 1, 1930 to December 31, 1939.

Q. Why did you start with 1930, Mr. Kuentz?

A. 1930 according to the records in the office of the department of taxation is the first year in which this corporation began doing business in the state of Wisconsin.

Q. Referring to the exhibit number five, will you explain for the benefit of the board where you obtained the opening figures for your analysis and the basis for those figures?

A. The basis and the opening figures are reflected on page five of Exhibit 5, and they were obtained from the printed annual reports submitted by the taxpayer corporation.

(Discussion off the record).

Mr. Connolly: It may be stipulated that we submitted to the department printed copies of our annual reports from 1929 to 1940 as I recall, which printed reports were prepared by C. P. A.'s hired by our company. Does that answer your question, Mr. Teschner?

Mr. Teschner: Yes, that is satisfactory.

Q. Mr. Kuentz, in making your analysis, determination of percentages and computation of tax, did you give recognition to every known dollar of Wisconsin earnings and every known dollar of total earnings everywhere?

A. I did.

Q. And I am calling your attention first to Exhibit 2 which was the first notice sent out to the petitioner after the case had been received from the supreme court—you are familiar with that, are you not?

[fol. 97] A. I am.

Q. And you are also familiar with the fact that the petitioner filed an application for abatement of that assessment that is now in evidence as Exhibit 3?

A. Yes, I am familiar with that.

Q. And you are also familiar with the fact that certain concessions were made as a result of that application for abatement?

A. They were in the partial denial of the application of this abatement.

Q. And that partial denial is Exhibit 4 in this record?

A. It is.

Q. And therefore Exhibit 5 reflects the tax computation giving recognition to the concessions requested in the application for abatement?

A. Yes, to certain objections in this application which are referred to in the notice of partial denial.

Q. Yes, Mr. Kuentz, thank you. One more question, Mr. Kuentz. Speaking generally now, Mr. Kuentz, and as an accountant, can surplus of a corporation be determined at any other time except the end of the corporate year?

A. It is possible, provided the corporation closes its

books at different times during the year. It would mean a complete and accurate closing at other times, involving also the taking of inventories and the determination of accrued expenses, and so forth.

Q. To your best knowledge and belief, was that done in the case of Minnesota Mining and Manufacturing Company during any of the years here under review?

A. Not from the—it was not done from the information which we have available in the department.

Q. That is, you mean that so far as you know, Minnesota Mining and Manufacturing Company only close their [fol. 98] books once a year?

A. That is my understanding, yes.

Mr. Teschner: That is all, Mr. Kuentz, thank you. You may cross-examine.

(Thereupon a short recess was taken.)

Cross-examination.

By Mr. Connolly:

Q. I think you testified that you went back and started out with surplus as shown on the books of the Minnesota Mining Company as of January 1st, 1930. Is that correct?

A. That is right.

Q. Now, the income tax department and also the privilege dividend tax department audited the reports of the Minnesota Mining Company or books of the Minnesota Mining Company from the inception of its business up to and including 1939. Is that correct?

A. I have to speak from memory. I think they audited all those years and I am not certain whether 1937 was covered or not.

Q. 1937 I think was covered by an office audit.

A. It was in the privilege dividend tax case, yes.

Q. Yes, I think that is correct. There wasn't any field audit in 1937. Now, subsequent to the supreme court mandate, Minnesota Mining and Manufacturing Company submitted to you its audit reports at the end of each year from 1929 on down to 1939. Is that correct?

A. That is correct.

Q. And from those audit reports and what audit reports you had, tax returns in the file, you prepared Exhibit 2?

A. No. Yes, originally Exhibit 2—that is correct.

[fol. 99] Q. And subsequently to mailing out Exhibit 2 we submitted some further information to you showing that there had been omitted from the surplus in some of the years some \$185,000 for real estate located in Northern Minnesota?

A. Yes, I believe that was submitted in Exhibit 3.

Q. And in this same report we submitted some information that we sold some treasury stock at a profit of some \$116,000 which you had not taken into consideration in preparing Exhibit 2?

A. I don't remember the items without referring to Exhibit 3.

(Discussion off the record.)

A. (Continuing:) That was received in information submitted by you and received by the department on October 9th, 1941. It consisted of five items as I have it here, one, a reserve for unlocated stock of \$132; then shares located, the red figure of \$48, a gain from the sale of treasury stock of \$111,649.92, and loss from the sale of treasury stock of \$5462.09, and then this adjustment for Crystal Bay property of \$185,000.

Q. And in your preparation of Exhibit 5 you made the corrections as in those five items?

A. That is correct.

Q. Now, in the preparation of Exhibit 5 you started with the surplus as shown on the books as of January 1st, 1930?

A. That is correct.

Q. And the result then was surplus as of January 1st, 1931?

A. Correct.

Q. Now, you have followed that procedure all the way through to 1939, so that you stopped with a surplus as of January 1st, 1940?

A. That is correct.

[fol. 100] Q. Now, we have been talking about the entire surplus, not that part that you allocated to Wisconsin. Now, in addition it is my understanding that you took the earnings in Wisconsin and you deducted those earnings from the total earnings, the first year being 1930.

A. I don't think I deducted them from the total earnings. I set them up in a separate column.

Q. You set them up in a separate column to get at what you call outside earnings?

A. Right.

Q. So we have two types of earnings in 1930, Wisconsin earnings and all other earnings?

A. Right.

Q. Then you followed that same procedure by adding to the Wisconsin earnings in the second year—well, we first say the dividends paid in 1931, you deducted a proportion of the dividends paid in 1931 from outside earnings and a proportion to Wisconsin earnings.

A. Yes, the proportion that the balance in the surplus account for Wisconsin is to the total.

Q. Take the first year here, we have a surplus as of December 31, 1930; a total surplus—

A. May I have reference to that.

Q. I will read the question and then I will give you the exhibit.

Mr. Teschner: You have your own copy, haven't you?

Mr. Connolly: No, I haven't a copy.

Mr. Teschner: I don't think Mr. Kuentz can adequately present this.

Mr. Slater: You are referring to schedule 2, page 2. Is that correct?

Mr. Connolly: That is right, Exhibit 5.

[fol. 101] (Question read.)

Q. —of \$2,333,671.98: For the purpose of the record I am reading from Exhibit 5, page 2, schedule 2. Is that right, Mr. Kuentz?

A. That is correct.

Q. Then you had Wisconsin earnings for the year 1930 of \$2396.37. Is that right?

A. That is right.

Q. Then you figured the percentage of those Wisconsin earnings which you assume were in there at the end of 1930 to total surplus?

A. That is correct.

Q. And you arrived at a percentage of .1027.

A. Correct.

Q. And then the next dividend paid in 1931, still reading from the same exhibit, was \$576,131.40. You apply that percentage of .1027 to that dividend and allocated it to Wisconsin, \$591.69?

A. That is correct.

Q. Now, generally you follow that same procedure all the way through?

A. That is correct.

Q. In other words, to find out what percentage of the 1931 dividend was paid out of Wisconsin earnings under your theory, you used the percentage of Wisconsin surplus or your theory of Wisconsin surplus to total surplus for the—at the end of the prior year?

A. Correct.

Q. You follow that all the way through?

A. Correct.

Q. Now, in answer to Mr. Teschner's question, you told him that you did that because you felt that that was what the supreme court in its decision said you should do?

[fol. 102] A. That was my understanding, yes.

Q. That was your understanding. Now, you would be wrong in your computations if that is not what the supreme court said you should do, would you not?

A. Well, I imagine if I am wrong in my understanding, that the computation that follows that is wrong.

Q. What is your answer, yes or no?

A. I would answer yes.

Q. You would be wrong?

A. Yes.

Q. Did you from the examination of the audit reports submitted by petitioner, the audit reports made by the auditors from your department, the tax returns, examination of those tax returns—did you attempt to make any determination as to what actually was done with the earnings from Wisconsin by the Minnesota Mining Company?

A. I didn't and I don't believe that can be done.

Mr. Connolly: Will you strike the last part of the answer as not responsive.

Mr. Teschner: No, the witness has a right to give an answer and to complete that answer.

Mr. Connolly: The question was, did he, and he says he did not. That is responsive to the question. I would like the remainder of that stricken.

Mr. Teschner: He can qualify any answer.

Mr. Slater: That appears to be a yes or no answer question, Mr. Teschner and the witness went beyond that point.

Mr. Teschner: The witness doesn't have to answer yes

or no if he cannot. The witness shouldn't be denied a right in a proceeding of this sort—before a jury, yes.

Mr. Slater: You have a right to bring that situation out later.

[fol. 103] Mr. Teschner: Yes, but this is a board expert in tax affairs, and why should we go through the routine of bringing it out later instead of bringing it out now. We are interested in making a short concise record.

Mr. Slater: Of course, how quickly we finish is up to the parties more so than the board. If the petitioner's counsel insists on having that motion ruled on, we must consider the motion.

Are you waiting for a ruling now?

Mr. Teschner: Yes.

Mr. Ela: Yes.

Mr. Conway: It is impossible to state just what the effect of this answer would be, as to what weight and consideration the board should give to it. It can't do a great deal of harm if it is left in there. Proceed to answer the question.

Mr. Connolly: He has answered it, Mr. Chairman and after he answered it he went on and gave his opinion on another matter or on the same matter. That is what I would like to have stricken out.

Mr. Conway: Well, we will let the matter stand at present until we come to consider it.

Mr. Ela: Is there a ruling on this motion to strike? That is what we are waiting for.

Mr. Teschner: It has been overruled, as I understand it.

Q. In your computation, Mr. Kuentz, you assumed that you were able to trace the earnings of \$2396.37 earned in Wisconsin and find it in the total surplus at the end of that year. That is your assumption, is it not, from that computation?

A. Not that I can trace it in the sense of identifying it if it is in there.

Q. Well, you assume that—you must have assumed that it is in there from this computation, but just what was your theory there?

[fol. 104] A. The theory that so much of that surplus had been earned in Wisconsin.

Q. And is still there?

A. Still there until paid out in the form of dividends or dissipated in some other way.

Q. What way would you consider it might be dissipated?

A. Might be dissipated in the form of losses.

Q. Is that the only way?

A. Or in the payment of dividends. I testified before generally as to the ways in which surplus is dissipated.

Q. I am thinking of the particular item of surplus that came from a particular source. I am not speaking of the entire surplus.

A. I think that would be dissipated in the same way as the entire surplus is dissipated.

Q. That is a proportion of it?

A. That is correct.

Q. The first dividend that is taxable, paid by the Minnesota Mining Company, as I recall from the record, was paid January 2nd, 1936.

A. Are you asking me; that is what the record shows from Exhibit 5.

Q. What is the second taxable dividend?

A. The second one as shown from the same exhibit is on April 1, 1936.

Q. Did you make any attempt to ascertain what surplus was on hand April 1, 1936, when you were making up Exhibit 5 or the computation of liability?

A. No, I used the same opening surplus balance as I did in the preceding dividend.

Q. That is the surplus as of December 31, 1935?

A. That is correct.

[fol. 105] Q. Did you cause any investigation to be made or make any yourself to ascertain whether the Minnesota Mining Company closed its books as of April 1st, 1936 or made up any estimated statements as to what its surplus was as of that day?

A. I wouldn't use estimated statements. I used the annual statements submitted by the corporation and our own annual audit reports.

Q. I don't know that that entirely answers my question but I will ask the balance of it, that you didn't answer in this way—supposing that it had closed its books as of that date, what would you have done?

A. If I had the information available it had closed its books and the information would have been submitted to

me, I would have determined any surplus balance at that time.

Q. And that the information was submitted to you by the Minnesota Mining and Manufacturing Company that it closed its books only as of December 31st, each year.

A. That is my information, yes.

Q. And it is also a fact that they stated they took no other inventories at any other period.

A. I am not familiar with that statement.

Q. Well, let's assume that is the fact, that they close their books as at the end of each year, and they only take one inventory and that is as of December 31st at the end of each year. Do you think it is possible to make up a correct surplus account at each dividend payment date?

A. No, I don't think it is possible to revise the surplus as of each dividend date by the amount of earnings up to that time without closing the books and knowing what those earnings are.

Q. And that is one reason why you didn't do that?

A. That is one reason, yes.

[fol. 106] Q. The other reason is you thought Judge Rosenberry told you that December 31st or the end of the fiscal year?

A. Yes, that is my understanding of what he said.

Q. Now, in Exhibit 9 you made a revised computation of tax, did you, due from Minnesota for the dividends paid during the year 1937?

A. That is correct.

Q. And in Exhibit 13 you made a revised recomputation of the tax due from Minnesota for the dividends paid during the years 1938, 1939, and 1940?

A. That is correct.

Q. Did you use the same method of computing the tax under 9 and 13 that you did in Exhibit 5?

A. Used the same method, in fact, a continuation of the same analysis.

Q. That is, you took the surplus not as of the date the dividend was paid but as of the previous January 1st?

A. Correct.

Q. And you took the percentage of the alleged surplus in Wisconsin and applied that to the dividends paid during each year?

A. That is correct.

Mr. Connolly: I guess that is all, Mr. Kuentz.

Mr. Teschner: That is all, Mr. Kuentz.

Subject to the right to call witnesses in rebuttal and subject to one other matter that I haven't yet become clear on, the petitioner submitted certain printed audit reports showing the status of its affairs at the close of the year—there has been considerable questioning on cross examination on closing the books at any other time. Now, if there is to be any issue made of that that you did close them at any other time, then I want to make an offer of the printed reports that you submitted.

[fol. 107] Mr. Connolly: Mr. Teschner, there is no such contention. We didn't close our books at any other time other than December 31st each year.

Mr. Teschner: I see. The respondent rests and moves for affirmance of the assessment in accordance with the second revised recomputation in each of the three cases.

Opening statement by appellant's attorney omitted.

HERBERT P. BUETOW, a witness in behalf of the petitioner, being first duly sworn, testified as follows:

By Mr. Connolly:

Q. Will you give your full name to the clerk or reporter rather?

A. Herbert P. Buetow.

Q. You testified before the former Wisconsin tax commission in the hearing in 1938?

A. Yes, sir.

Q. And your testimony is recorded in Exhibit 1, I think it is?

A. Yes, sir.

Q. There is in the record, Mr. Buetow, your testimony as to your previous experience?

A. Yes, sir.

Q. At that time I think you testified you were comptroller and assistant treasurer of the Minnesota Mining and Manufacturing Company?

A. Yes, sir.

Q. What is your position at the present time?

A. Treasurer and comptroller.

Q. Treasurer and Comptroller. How long have you been treasurer?

A. Since March 1939.

Q. Do you have any other position with the Mining Company, any other official position?

[fol. 108] A. Assistant secretary.

Q. Exhibit 14 contains a statement on page four of the total amount of dividends paid from and after January 2, 1936, to and including December 19, 1940. Have you got that exhibit before you and does that include all of the dividends paid by the Minnesota Mining and Manufacturing Company subsequent to the effective date of the privilege dividend tax law?

A. Yes, sir.

Q. And was the full disclosure of all dividends paid given to the Wisconsin tax department?

A. Yes, sir.

Q. When did Minnesota Mining and Manufacturing Company start operations in Wisconsin?

A. It was late in December 1929 but we weren't officially operating until about the first of January, 1930.

Q. What was the first year you derived any income?

A. The year 1930.

Q. Now, from 1930, for all of the years down to and including 1940, has there been a full disclosure to the Wisconsin tax department?

A. Yes, sir.

Q. Of the total amount of income received by Minnesota Mining?

A. Yes, sir.

Q. On Exhibit 14, on page 4 and carrying over to and including a part of page 9, there is set out in this stipulation resolutions adopted by the board of directors of the Minnesota Mining and Manufacturing Company at the time dividends were declared. Where were those meetings held, Mr. Buetow?

A. In St. Paul, Minnesota.

Q. Was there ever any directors meetings held during that period of time from December 16, 1935, to December 1940, in any other place than St. Paul?

A. No, sir.

[fol. 109] Q. Again referring to Exhibit 4, page 4, or Exhibit 14, page 4, the amount of dividends paid during the period from January 2nd, 1936, to and including December

19th, 1940, were any of those dividends paid from funds in a Wisconsin bank?

A. No sir.

Q. Where were the funds, from which those dividends were paid, deposited?

A. They were taken from funds located or deposited at the First National Bank, St. Paul, Minnesota.

Q. I think that the record will show that the mechanics was for Minnesota Mining and Manufacturing Company to draw a check on the First National Bank of St. Paul?

A. Yes, sir.

Q. And turn it over to its transfer agent?

A. Yes, sir.

Q. Which transfer agent disbursed it to the stockholders of the Minnesota Mining and Manufacturing Company?

A. That is correct.

Q. Now, that is true for all of the years from 1936 to and including 1940?

A. Yes, sir.

Q. Now, there is in the record—again referring to Exhibit 1, the total number of stockholders that Minnesota Mining and Manufacturing Company had during 1935 and 1936. For subsequent years will you give us the total number of stockholders?

A. I think you have the memorandum there, Mr. Connolly.

Q. First I would like to ask you the total number of stockholders wherever located of Minnesota Mining and Manufacturing Company.

A. On January 1st, 1938, there were 2260 stockholders. On January 1, 1940, there was 2610 stockholders.

[fol. 110] Q. Owning how many shares of stock on each of those dates?

A. 961,260.

Q. Has there been any change in the number of shares outstanding from 1935 to and including 1940?

A. No sir.

Q. Will you tell us the number of stockholders located in Wisconsin in 1938, if you have that figure?

A. On January 1, 1938, there were 44 Wisconsin stockholders owning 4940 shares.

Q. Have you got it for a subsequent date?

A. On January 1, 1940, there was 48 stockholders owning 3358 shares.

Q. Have you had charge of closing the books for all of the years from 1929 down to and including 1940?

A. Yes, sir.

Q. When are the books of the company closed?

A. December 31st of each year.

Q. Are they closed at any other time?

A. No sir.

Q. Do you make quarterly closings?

A. No sir.

Q. Do you take quarterly inventories?

A. No sir.

Q. Again referring to Exhibit 14, page 4, the second dividend during the year 1936 was paid April 1st, 1936, and it amounted to \$216,009.72. Were the books closed at that time?

A. No sir.

Q. Was a physical inventory taken?

A. No sir.

Q. Who prepares the federal income tax returns for the Minnesota Mining and Manufacturing Company for all of these years in question?

A. I do.

[fol. 111] Mr. Teschner: Now, just a moment. What is the materiality of anything connected with the federal income tax returns to this particular case?

Mr. Connolly: The purpose of the question is to show that it was impossible to estimate the amount of earnings for the year 1936 as of April 1936, July 1st, 1936, October 1st, 1936, December 22nd, 1936—at the dates these particular dividends were paid.

Mr. Teschner: I don't see how the federal returns can show that. He may testify to it as a fact. The federal returns wouldn't show that. They have nothing to do with that proposition.

Mr. Slater: The question was a preliminary one.

Mr. Connolly: That is what it is.

Mr. Slater: I don't think it will do any harm to have it answered, and we can see how far it is to be pursued.

Mr. Connolly: I don't know whether the question was answered or not. Was it, Mr. Reporter?

A. You asked me, and I said I did make up the federal returns.

Q. That is, you prepared the returns for all of the years from 1929 down to and including 1940?

A. Yes, sir.

Q. Can you tell us, Mr. Beutow, what the rate of federal tax in effect for the calendar year 1935 was?

A. Can I refer to these returns?

Mr. Teschner: Just a moment. There is an objection to the materiality or relevancy of that question. What material bearing can the federal rates have upon this case.

Mr. Conway: The question was, can he tell what the federal rate of tax was.

Mr. Slater: I think we should have a statement as to the purpose to be obtained.

[fol. 112] Mr. Connolly: The purpose of those questions is to show that it was impossible to ascertain the amount of the surplus available as of April 1st, 1936, July 1st, 1936, October 1st, 1936 and December 22nd, 1936. The reason being that the amount of earnings for 1936 to go in surplus could not be ascertained even though the books were closed on any of those dates. That is the purpose of that question.

Mr. Teschner: My answer to that is, what have the federal tax returns to do with such a determination?

Mr. Connolly: And my answer to that is, you cannot pay a dividend out of the amount that you owe to Uncle Sam. It is objectionable upon the theory that the witness for the state testified to—his theory was that it was December 31, 1935, and December 31 subsequent was the date he was to take for determining the amount of surplus available. We do not subscribe to that theory. Now, if that theory is incorrect and what Judge Rosenberry was talking about is, you should find the surplus from all sources as of April 1st, 1936: I am trying to show you can't do it.

Mr. Slater: I think you have explained the primary purpose. It is to support your theory of the case, and I think only as to that purpose it would be admissible.

Mr. Connolly: That is the only purpose for which it is offered, your Honor.

Mr. Slater: You may proceed along those lines.

Mr. Connolly:

Q. The question I think Mr. Beutow, is—what were the federal rates in effect for the calendar year 1935?—

A. 13 $\frac{3}{4}$ per cent normal tax.

Q. That is 13¾ per cent of the net income?

A. That is right.

[fol. 113] Q. That would be all of Minnesota Mining and Manufacturing Company income from all sources?

A. Yes, sir.

Q. How do you file reports to the federal government, income tax reports, on a calendar year basis or fiscal?

A. Calendar basis.

Q. Ending December 31?

A. That is right.

Q. Was there any other federal tax in effect in 1935?

A. There was a five per cent excise profits tax based on a declared value set up prior to that time.

Q. What were the rates in effect on April 1st, 1936, at the time the first dividend was paid?

A. They were approximately the same.

Q. There has been no change in the federal law up to that time?

A. That is right.

Q. Was there any change made in the federal law in 1936?

A. Yes, in June 1936, the law was changed.

Q. Will you give us the rates for 1936?

A. The normal tax was increased as follows—do you want this in detail? Eight per cent on the first two thousand; 11 per cent on the next thirteen thousand; 13 per cent on the next 25 thousand and 15 per cent on the balance. In addition to that there was levied a surtax on undistributed profits.

Q. What were the rates on that, the range?

A. The rates ranged from 7 to 27 per cent.

Mr. Teschner: I would like to now interpose now one of Mr. Ela's continuing objections to all testimony concerning federal returns, rates, reports and other federal taxes on the grounds the same are not material or relevant to this controversy, and I take it the record will show that I have made that objection to a question before and about to come. [fol. 114] Mr. Conway: The record may show that. The record must be accurate.

Mr. Connolly:

Q. Mr. Buetow, that change made in June, 1936, when did that become effective?

A. It was retroactive to January 1st, 1936, or for the calendar year 1936.

Q. Will you explain to the board how the undistributed profit tax operated?

A. Well, practically it operated to the extent that the tax was not determined until the final dividend had been declared. In other words, there was a tax levied on the undistributed part of the income for the year.

Q. Well, would the dividend tax declared on the 22nd day of December, 1936, amounting to \$624,396.50, tend to increase the corporate tax or decrease it?

A. If we had paid no dividend it would have increased the corporate tax for that year.

Q. I think you stated you could not determine the amount of that undistributed tax until that time?

A. Until the final dividend was declared for the calendar year.

Q. What is the fact Mr. Buetow, as to the rates in effect for 1937. Were they the same as they were in 1936?

A. Yes, sir.

Q. What is the fact as to the federal rates in effect for 1938?

A. The revenue act of 1938 was passed May 27th, 1938 and again changed the rates.

Q. When did it become effective?

A. Retroactive to January 1, 1938.

Q. What were the rates?

A. 19 per cent tentative normal tax with a reduction for dividends paid.

[fol. 115] Q. In other words, there was part of this 1936 act on undistributed earnings carried into the 1938 act?

A. Yes sir.

Q. What is the fact as to the rates in effect for federal tax in 1939?

A. That was on the same basis as 1938.

Q. 1938. What is the fact as to the federal rates in effect for 1940?

A. Well, in 1940 we had two revenue acts. In June, 1940, the first act was passed levying a ten per cent defense tax and then in October—

Q. Well, would you explain for the purpose of the record just how that would work out?

A. Well, 10 per cent was added to the rates then in effect.

Q. In other words, this 19½ per cent became 20.9 or something like that?

A. That is right.

Q. And when was that effective?

A. That was retroactive to January 1st, 1940.

Q. What happened after that?

A. Then in October 1940, there was enacted a new revenue act of 1940 which imposed an excess profits tax, a war excess profits tax with rates from 20 to 50 per cent and in addition raising the normal rates.

Q. Is this a correct statement of how that would operate, that everything over and above the first half million was taxed at \$204,000?

A. Yes sir.

Q. And the balance over that 50 per cent?

A. Yes sir. Then that again was changed in March, 1941, which was still retroactive to January 1st, 1940; in fact, our published reports were incorrect to that extent.

Q. In what way?

[fol. 116] A. The credit for excess profits was changed on March 8th for the calendar year 1940; March 8th, 1941 they were changed.

Q. And that was retroactive back to January 1st?

A. The calendar year 1940.

Q. You say the audit report—published report is incorrect?

A. Yes sir, the published report was sent to the stockholders before the amendment to the law became known.

Mr. Teschner: Mr. Connolly, we don't concern ourselves with 1941.

Mr. Connolly: It is effective for 1940 though, Mr. Teschner.

Mr. Teschner: You are going to stop though, after—

Mr. Connolly: We are not going beyond this. We are not going into the revenue act of 1941, which was passed here recently.

Q. Approximately how much is that tax reserve overstated in that report?

A. \$428,000.

Q. When did you know the exact surplus as of December 31, 1940?

A. On March 8th, 1941.

Q. After the passage of this act?

A. Right.

Q. In other words, you closed the books and that changed it by 418 thousand?

A. 428 thousand.

Q. 428 thousand. Was it over or under?

A. Our reserve was overstated.

Q. By the 428 thousand?

A. Yes sir.

Q. But when thrown back would increase surplus as of that date?

A. Yes sir.

[fol. 117] Mr. Connolly: We make no point that this hasn't been picked up and properly treated by the department in its computations. We just bring it out to show it is impossible to tell at any dividend date what the true surplus was.

Mr. Conway: Couldn't it be ascertained?

Mr. Connolly: No, your Honor. When congress did come along in 1941—

Mr. Conway: I don't care what they are going to do.

Mr. Connolly: And what they are going to do is of vital effect on how much cash we are going to have to pay these stockholders.

(Paper is marked Exhibit 15, AJK.)

Q. Were your dividends paid during any of the years 1936 to 1940 inclusive out of any special dividend account, Mr. Buetow?

A. No sir.

Q. You don't have any such thing as a dividend account?

A. No sir.

Q. It came out of the general deposits of the corporation, didn't it?

A. Yes sir.

Q. Out of the same account, I take it, as you pay all the other expenses?

A. Yes sir.

Q. Do you attempt in any way to earmark any of the earnings coming from Wisconsin or from any other state?

A. No sir.

Q. I think the record will show it, but I might ask you—did Minnesota do business in any other state than Minnesota and Wisconsin?

A. Oh yes, quite a number.

Q. In fact, it does business in all 48 states, doesn't it?

A. It does but not qualified to do business in every state. [fol. 118] Q. In this fund from which the dividends were paid, was there any gains from the sale of any capital assets?

A. Yes.

Q. In other words, all types of gains were in this same fund, is that right?

A. Yes sir.

Q. Had Minnesota Mining and Manufacturing deducted any portion of this tax from the stockholders?

A. No sir.

Q. Has it paid the tax or any part of it?

A. Well, it hasn't paid it to the state officially. It set it up.

Q. Deposited it?

A. Deposited it with the state.

Q. Have you with you, Mr. Buetow, the original records or some of the original records of the list of stockholders for any particular date?

A. Yes..

Mr. Connolly: I won't offer that in evidence because those are our original records but I would like to ask Mr. Buetow some questions and he might testify from it.

Q. From an examination of that record, have we any stockholders that have a small number of shares?

A. Yes sir.

Q. Will you refer to the particular number there?

A. Well, on the first page there are two stockholders who have three shares each. On the second page—on the third page one stockholder has two shares.

Q. And are there many of those stockholders generally?

A. Yes sir.

[fol. 119] Q. Did you ever attempt, Mr. Buetow, to compute the amount of tax that you would deduct from that stockholder that had two shares?

A. I tried to but wasn't very successful.

Q. On the basis of the proposed assessment?

A. Because it can't be done.

Q. Why can't it be done?

A. It can't be done correctly because in the case of a small stockholder the amount to be deducted might be less than one cent. It would be a fractional part of a cent.

Mr. Teschner: I would like to interpose an objection to the question and answer, and move that the same be stricken for the reason that the computation of the amount that might or should be deducted from the stockholder's dividend is entirely immaterial when there is testimony that there never was a deduction and no claim being made by the state here that there should be such a deduction. Therefore, that becomes entirely immaterial.

Mr. Connolly: The law specifically authorizes the taxpayer or I mean it authorizes the payor corporation to deduct it and there is no claim made here that if and when this is finally adjudicated against this company, that it won't be deducted from that stockholder that has two shares. Or that it won't be deducted in the future if this tax continues and is sustained.

Mr. Slater: As we understand, in the process of the evidence it is practically in line with your offer of the federal revenue evidence; it tends to bring out your theory of the case as stated in the petition, and so that we do not interfere with the right on your part to emphasize all of your points. That would be the only purpose of the evidence, as otherwise pointed out Mr. Teschner's objection would be valid except we do not want to restrict the petitioner here [fol. 120] in advancing what testimony it wants to offer.

Mr. Teschner: I think that is a fair statement, and I will just make the objection again and continue that.

Mr. Connolly: It is in line with the allegations on page seven of this last petition, your Honor.

Q. Who did actually make the physical deduction, Minnesota Mining Company or the trust company?

A. The First Trust Company who is our registrant and transfer agent.

Q. Well, do they make the charges on the basis of certain transactions with each stockholder?

A. Yes sir.

Q. So that if it was deducted it would increase the cost of the company?

A. Yes sir, very materially.

Q. Who maintains the stock records of the Minnesota Mining and Manufacturing Company?

A. First Trust Company of St. Paul.

Q. And they are all maintained in St. Paul?

A. Yes sir.

Q. Not maintained in Wisconsin?

A. No sir. There is a duplicate set kept by the Corporation Trust Company in Delaware.

Q. To comply with the Delaware laws?

A. Yes sir.

Mr. Conway: Is that the only one outside of Minnesota—Delaware?

A. Yes sir.

Q. Have you got with you there the copy of your audit report for any year?

A. My own audits.

Q. Yes, or the ones made up by the tax department or the ones made up by the certified public accountants?

[fol. 121] A. I don't have the one made up by the C. P.

A. I think you have it, Mr. Teschner.

Mr. Teschner: Yes, I have got it. Right here they are.

Q. I will ask you if the amount of surplus at the end of 1935, 1936, 1937, 1938 and 1939 is all invested in tangible assets?

A. No sir.

Q. Generally, what is it invested in—

A. Well, there is accounts, inventories, fixed assets, such as land, buildings, machinery, equipment.

Q. Have you any stock of partially own—subsidiaries?

A. Yes, we do.

Q. And I assume there is cash in addition to those others?

A. Yes.

Q. During any of those years did the cash amount to the equal of your surplus?

A. No sir.

Q. Did Minnesota Mining and Manufacturing Company during the period from 1929 to 1940 inclusive borrow any money to pay dividends?

A. No sir.

Q. Since 1930 down to and including December 31, 1940, did the Minnesota Mining and Manufacturing Company borrow any money for the purpose of expansion?

A. Will you explain?

Q. From 1931 to 1940?

A. We did not borrow any money since 1931.

Q. In 1931 there was some money borrowed to acquire some fixed assets?

A. In 1930.

Q. 1930. What is the fact as to books and records of the company. Do we keep a separate set of books for Wausau?

A. No, but we do have special accounts on all of our books so that the accounts can be segregated from all other [fol. 122] accounts for all other operations throughout the company.

Q. How about the question of physical assets used in operating Wausau. Can you tell from your books and records what those were on any particular date?

A. Yes sir.

Q. I will ask you as of the end of each year.

A. Yes sir.

Q. Have you those records with you?

A. Yes sir.

Q. I will show you Exhibit 15 and I will ask you what that is, Mr. Buetow?

A. That is a statement of net assets and net earnings and advances from St. Paul to operate the Wausau division.

Q. Who prepared it?

A. I did.

Q. From what source did you get your information?

A. From the general books of the company.

Q. And those books are kept by you?

A. Yes sir.

Q. Or under your direction?

A. Under my direction.

Q. Are the books true and correct?

A. Yes sir.

Q. Does that statement reflect all of the assets used in operating the business in Wisconsin as of December 31 of each one of those years?

A. Yes sir.

Q. Is that statement true and correct?

A. Yes sir.

Q. Did Minnesota Mining and Manufacturing Company ever have any earnings out of the state of Wisconsin?

for the purpose of paying dividends—available for the purpose of paying dividends?

[fol. 123] A. Outside the state of Wisconsin?

Q. No, from the state of Wisconsin?

Mr. Teschner: That question is objected to as calling for a legal conclusion of the witness. There is testimony here that the earnings are not segregated, not ear-marked in any way.

Mr. Connolly: I will withdraw that question at this time and I will offer Exhibit 15 in evidence.

Mr. Teschner: We want to reserve our objection to Exhibit 15. We have seen something that was supposed to be like this but this looks a little different, Mr. Ela.

Mr. Ela: It is substantially the same. Mr. Buetow will testify he has made slight changes in this to correspond with the actual facts. The exhibit, Mr. Teschner, is substantially the same as the one we submitted to you in the hope we could stipulate on the figures, but Mr. Buetow will explain that difference.

Q. I will ask you, Mr. Buetow, what difference there is in the figures in Exhibit 15 and the ones previously submitted to the department.

A. Well, there was typographical error on the other exhibit and this one is changed to the extent that factory supply inventories were added to the assets which changed the advances from St. Paul.

Mr. Teschner: Do you mind if I ask a question concerning this exhibit at this time?

Mr. Connolly: Not at all.

Mr. Teschner:

Q. Mr. Buetow, does Exhibit 15 purport to be a balance sheet of Minnesota Mining and Manufacturing Company?

A. I said it was a statement of net assets and advances from St. Paul. That wouldn't necessarily be construed as a balance sheet. The balance sheet would have other items on it.

[fol. 124] Q. Do you intend to have this construed here as a balance sheet?

A. Not necessarily.

Q. Well, do you?

A. Well, you will have to tell me what you mean by a balance sheet and I will tell you whether I construe it as

such. I mean we have accounting terms for balance sheets, and if you will ask me that question I will say no, this is not a balance sheet.

Q. Have you given any—have you made any allocation of capital stock to the deduction portion of this schedule?

A. No sir.

Q. You have not?

A. That is right.

Mr. Teschner: That is all, Mr. Buetow. Our objection is still being made that this is immaterial and irrelevant.

Mr. Connolly: The purpose of that offer is to show what assets we had in Wausau and what disposition was made of the income that we got out of Wausau. That is the purpose of the offer.

Mr. Slater: Mr. Teschner, you are not objecting to this because it may not be the best form of evidence? Just as to the materiality?

Mr. Teschner: Just to the materiality and to its relevancy.

Mr. Conway: What is the nature of this Wausau?

Mr. Connolly: The Wausau operations is the quarrying of quartzite and the crushing and screening it and adding—running it through a heated kiln and adding a chemical to make rough granules. That is the only operation we have in Wausau.

Mr. Ela: The only operation in Wisconsin, too.

Mr. Teschner: Did I understand you to say, Mr. Connolly, that this Exhibit 15 purports to show the disposition of the Wisconsin net earnings?

Mr. Connolly: We offer it for that purpose. Now, whether it does or it doesn't is a question of construction and question of argument.

Mr. Slater: We understand these items might be obtained by looking at the income tax reports for the same period of time. It is merely a summary of what might otherwise be shown on income tax reports.

Mr. Connolly: The only item that could not be obtained there is the amount of cash and the amount we label as advances from St. Paul. They wouldn't be shown on the income tax report. Everything else is on there. The net income, the reserve, and depreciation, the buildings, income, and machinery.

Mr. Slater: Is there any serious objection in view of that?

Mr. Teschner: Yes, the objection is very seriously made. This is neither material or relevant to the issues in this case.

Mr. Slater: I assume in this situation we should accept it subject to the objection. There is a third member here who might consider it has some merit and we don't want to foreclose him of the opportunity of examining it.

Mr. Teschner: With the objection noted and accepted that way, and subject to further cross-examination in rebuttal, of course.

Mr. Slater: Did it carry any bank account in Wausau?

Mr. Connolly: Yes, your Honor. That Exhibit will show a cash bank account of December 31, 1930 of \$25.16, and the last one is \$13537.49. It ranges all the way from less than one hundred dollars, less than seven hundred dollars, less than five hundred, less than five thousand, less than nine thousand, less than seven thousand, less than eight, less than seven hundred, less than twelve, just slightly under 14 in 1940. It shows every item in the Wisconsin operations.

[fol. 126] Q. Now, Mr. Buetow, if you will refer to Exhibit 15, will you tell me what the assets or investment in Wausau, Wisconsin, was December 31, 1930?

A. The investment—advances from St. Paul.

Q. No, just the total assets?

A. \$55,277.54.

Q. What were the earnings for that year?

A. \$2396.37.

Q. Where did the difference come from?

A. The money was advanced from St. Paul.

Q. Taken out of this same account out of which it paid dividends out of?

A. Yes sir.

Q. Take the next year, 1931, give me the gross assets.

A. \$60,478.63.

Q. And what were the accumulated earnings for the two years up to that time?

A. \$13,924.06.

Q. Where did this difference of 40 thousand come from?

A. That was advanced from St. Paul.

Q. Taken from these same funds?

A. Yes sir.

Q. Then 1933—skip 1932.

A. Total assets were \$224,618.33 and the advances—the total earnings were \$23,216.07. Advances from St. Paul were \$180,886.25.

Mr. Conway: By that you mean the Wausau plant?

A. That is in the Wausau plant only.

Q. Does that mean, Mr. Buetow, for that year there was advanced—that there was expended down there 224 thousand and the only amount of earnings up to that date was 23 thousand?

[fol. 127] A. Not necessarily expended because there was a cash balance but practically so. That is not the exact figures.

Q. Take the next year, 1934.

A. Total assets were \$813,508.39; the net earnings were \$7999.84; the advances from St. Paul amounted to \$748,961.06.

Q. What reduced that earnings from \$23,216.07 to \$7999.84?

A. We had a loss in the Wausau operations.

Q. But notwithstanding the loss, you still put back in there something over half a million dollars in Wisconsin?

A. Yes, sir.

Q. Now, let's take the figures at the end of 1940. Will you give us those same figures?

A. Total assets are \$2,137,831.03; total earnings \$1,391,288.93, and the advances from St. Paul \$204,485.19.

Q. That figure that you gave me for net income is the total net income from 1930 on to and including 1940?

A. That is the accumulated earnings.

Q. Only one item deducted?

A. That is it.

Q. Accrued income taxes.

A. Yes, sir.

Q. That hadn't been paid until the subsequent year?

A. That is right.

Q. In the declaration of dividends by the stockholders—board of directors, I should say—and by the way, are you a member of the board?

A. Yes, sir.

Q. Was there ever any attempt made to declare a dividend out of any particular state's earnings?

A. No, sir.

Q. What was it declared from?

[fol. 128] A. Out of the total earnings of the company.

Q. By total earnings you mean surplus?

A. Surplus earnings.

Mr. Conway: No matter where they emanated from. Is that right?

A. Yes, sir.

Q. From an examination of Exhibit 15 and your knowledge as an accountant and your experience as previously shown in this record, what would Exhibit 15 disclose at the end of 1940 as far as money put in Wisconsin was concerned?

A. You mean in dollars?

Q. In dollars.

A. \$204,045.19.

Q. I mean total dollars, Mr. Buetow?

A. \$2,137,831.03.

Q. Now, all of that is tied up in inventories, bricks and mortar outside of the cash?

A. Right.

Q. And for the total operations in Wisconsin you had how much earnings?

A. \$1,391,288.93.

Q. Where did the balance come from?

A. Advanced from St. Paul.

Q. In other words you spent \$204,000 more in Wisconsin after taking into consideration depreciation, than you actually made in Wisconsin?

A. Yes, sir.

Q. By you I mean Minnesota Mining. The income tax returns that are filed in Wisconsin, on what basis are they filed?

A. Under separate accounting basis.

Q. Are they on a fiscal or calendar year?

A. Calendar year basis.

[fol. 129] Q. And these separate records are kept for certain operations in Wisconsin?

A. Yes, sir.

Q. So that you can make up the tax return on that basis?

A. Yes, sir.

Q. It is true you have to allocate certain—

A. There are certain overhead expenses which are allocated.

Q. Mr. Buetow, I am going to ask you a question and I want you to take into consideration the resolutions adopted by the board of directors of the Minnesota Mining and Manufacturing Company from December 16th, 1935, down to and including the one adopted December, 1940, and also Exhibit 15—I am going to ask you if you have an opinion as to whether or not any dividends paid by the Minnesota Mining and Manufacturing Company during that period were paid from Wisconsin earnings. Answer that question yes or no.

A. No.

Q. I want to know if you have an opinion as to whether or not there was?

A. I have a very definite opinion.

Q. What is your opinion? I am going to ask you what your opinion is, and if Mr. Teschner wants to object, I wish you would wait a moment.

Mr. Teschner: No, I don't want to object; go ahead.

Q. What is your opinion?

A. I have an opinion there wasn't any dividends declared out of profits earned in Wisconsin.

Q. What is the basis of that opinion?

A. Because the earnings were all used to expand the business in Wisconsin. They were reinvested in fixed assets, inventories and so forth.

[fol. 130]. Mr. Conway: Any revenue produced in Wisconsin, was that sent to St. Paul?

A. When you figure it that way, the money all comes to St. Paul from the customers and is accumulated there from all sources, but when we spend money in Wausau we must take it out of the bank account at St. Paul to pay for it. When we spent 550 thousand for buildings, it has to be spent from money in St. Paul.

Q. In other words, when you spent during the year 1934 \$818,508.39 and had accumulated earnings up to that time of \$7999.84, it is your opinion that that balance of that comes from some other source?

A. Yes, sir.

Q. And that you weren't paying any dividends out of Wisconsin earnings?

A. Yes, sir.

Mr. Conway: Whatever was made in Wisconsin by way of revenue was sent to St. Paul. You mean to be understood that way?

A. I think that is right. I mean, when I said before, the money is commingled in St. Paul, including Wisconsin operations.

Mr. Conway: And when it gets there it is lost?

A. Yes, sir. It is just lost track of. It isn't quite lost.

Mr. Slater: May I ask you this question—

A. Yes, sir.

Q. What is the exact nature of the operations in Wausau?

A. We started with in the beginning, we bought the old Wausau Abrasive Company in Wausau who were manufacturing sandpaper. Included in those assets was Rib Mountain; we tried to find a use for the certain type of rock but we couldn't use that for sandpaper. There was a need for [fol. 130-a] a colored mineral which is deposited on asphalt shingles to protect it from the sun. Up to that point it had only had the natural color, the rock, for instance slate and red rock. We artificially color every little particle of mineral and sell it to the roofing companies, and the mining, quarrying, crushing and coloring takes place at Wisconsin. Now, we have certain by-products from that which Mr. Connolly mentioned which are not very important, such as sandblast.

Q. Are your operations in Wausau entirely unrelated to your operations in the east?

A. We have a similar operation in Tobe, Ohio, but neither one of those two plants have anything in common with the plant in St. Paul or Detroit.

Q. Are the experiences gained in Wisconsin a benefit to any other operation that the Minnesota Mining Company does anywhere else in the United States?

A. No, it is an entirely different product manufactured in Wisconsin.

By Mr. Teschner:

Q. But you sell that product throughout the entire United States?

A. Oh, yes. He asked me if we were benefited by Wausau operations. You asked me if I understood it.

Q. Whether there is any relation whatsoever, in other words, the Wausau operations are not an isolated operation of the Minnesota Mining Company?

A. Oh, absolutely they are.

Q. Don't they dovetail with any other operation?

A. No.

[fol. 131] By Mr. Tesehner:

Q. They dovetail with selling?

A. Sure.

Q. Assume that you do sell the products of the Wausau plant throughout the United States, that sale is handled by the Minnesota Mining Company, is it not?

A. Yes, sir.

Q. And it derives a benefit from the operations of the Wausau plant?

A. In that sense they do, yes, sir.

By Mr. Conway:

Q. This Wausau project according to your testimony is in the vicinity of Rib Mountain?

A. Yes. We take the rock off Rib Mountain.

Q. Is that the only area it covers?

A. Yes.

Mr. Connolly: We have a quarry north of Wausau.

A. Yes, that is right.

Mr. Connolly: Brokaw.

A. There is something wrong with the Rock in Rib Mountain. In other words, there is a certain transparency we can't get along with so we have to change the type and we are now operating in Brokaw.

By Mr. Connolly:

Q. Mr. Buetow, for the purpose of the record and information of the board members, you might tell what operations are carried on in St. Paul and Detroit.

A. In St. Paul we manufacture adhesive tapes and sandpaper and a varied line, such as automobile varnish, flat paints and so forth. In Detroit we make rubber cements. None of those products are made in Wisconsin.

[fol. 132] Q. Is there anything manufactured in Wisconsin that is used or has any relation to our other products?

A. Only as our Ohio plant makes the same class of material.

Q. But the operations are entirely different?

A. Yes, sir.

Mr. Connolly: You may inquire.

(Whereupon a short recess was here taken).

Mr. Connolly: Mr. Buetow, on the basis of computation of income used by the department for prior years, can you give us the net income of Minnesota Mining and Manufacturing Company from all sources for the year 1940?

A. \$5,734,476.36.

Q. Now, there is in the exhibits, the state's method of computation of surplus at the end of each year. On the same basis can you give us the surplus as of December 31, 1940?

A. \$15,236,387.37.

Q. That is computed on the same basis as the department used in prior years?

A. Same adjustments.

Mr. Connolly: That is all.

Cross-examination.

By Mr. Teschner:

Q. Mr. Buetow, assuming that the surplus of the Minnesota Mining Corporation is represented by the excess of its net assets over its outstanding capital stock, then answer this question: Does Minnesota Mining and Manufacturing Company have a separate surplus for Wisconsin?

A. No, sir.

[fol. 133] Q. Now, Mr. Buetow, are the surplus funds of a corporation generally speaking, the same as the balance in its surplus account?

A. No sir.

Q. And you have testified I believe several times but I want to repeat it once more to make sure I heard it correctly—are the earnings from Wisconsin property and business after they are credited to your general surplus account, earmarked in any way whatsoever?

A. No sir.

Q. Are the funds—I am speaking now of funds, derived—

A. You mean cash now?

Q. Cash funds or credits derived from the transaction of business in Wausau earmarked or kept separate from the general funds of the company?

A. If you are speaking of cash, they are not separately earmarked.

Q. You stated as a fact that in 1930 you acquired some physical assets in Wisconsin, did you not?

A. Yes sir.

Q. Was that purchase of physical assets charged to the surplus of Minnesota Mining?

A. Well, why don't you tell them how to answer the question. I don't think that is a statement that an accountant can answer.

Q. How is that transaction set up on the Minnesota Mining and Manufacturing Company?

A. The assets used by the—the physical assets of the Wausau Abrasive Company were set up on our books as physical assets or whatever assets there were.

[fol. 134] Q. Did it deplete the surplus account in any way?

A. Of what?

Q. Of Minnesota Mining and Manufacturing Company?

A. No sir.

Mr. Teschner: Now, I would like to have marked as Exhibit 16 the printed annual reports of the Minnesota Mining and Manufacturing Company for the years beginning with December 1, 1929, through and including the year 1940.

(Annual reports marked Exhibit 16, AJK).

Q. Now, Mr. Buetow, this is a copy of the annual reports of Minnesota Mining and Manufacturing Company as put out in printed form, is it not?

A. Yes sir.

Q. Taking at random the condensed balance sheet of December 31, 1935, I see that you have surplus unappropriated in the amount of \$3,291,492.35. Are Wisconsin earnings reflected or included in that figure?

A. Yes sir.

Q. And that would be true of any other balance sheet that I would pick out of this volume, would it not?

A. Except some—yes sir.

Mr. Teschner: I offer in evidence Exhibit 16.

Mr. Connolly: I would like to know the purpose of it, Mr. Teschner.

Mr. Teschner: There has been a lot of reference in the trial to those printed reports. If for no other reason than those various references, and the fact that those figures were taken from your books, that alone should entitle that document to be in this record as an Exhibit. Under our theory of the case, the second reason now why that should be in evidence, we of course say that there being no segregation of Wisconsin earnings, it does become material to know [fol. 135] that the surplus figure used by the petitioner corporation contains Wisconsin income as testified.

Mr. Connolly: He has testified to that, he will admit that; I will admit it.

Mr. Teschner: I think it is corroborative and primarily because so much reference has been made to those printed reports.

Mr. Conway: The same is received.

Q. Mr. Buetow, one more question. Have you or has anyone charged with that responsibility prepared a computation of the privilege dividend tax liability of Minnesota Mining and Manufacturing Company according to its interpretation of the Wisconsin supreme court mandate?

Mr. Connolly: I object to that, being incompetent, irrelevant and immaterial. The duty is not on the taxpayer to prepare any computation. It is our position here that we show in all the testimony that no dividends were paid out of Wisconsin earnings.

Mr. Conway: The question may be answered.

A. We have made no computation.

[fols. 136-138]

EXHIBIT No. 1

That Part of Exhibit 1 Attached to Transcript of Testimony Appearing on Record Pages of State Supreme Court 385-415

BEFORE THE WISCONSIN TAX COMMISSION

In the Matter of the Appeal of MINNESOTA MINING & MANUFACTURING COMPANY, from an Assessment of Privilege Dividend Taxes With Respect to Dividends Paid January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936 and December 22, 1936

This matter came on for hearing before the Commission on April 14th, 1938, at 10 A. M.

Before Commissioners Wm. J. Conway, Chairman; Herbert L. Mount, Henry A. Gunderson.

APPEARANCES:

For the Income Tax Division, of the Tax Commission, John S. Best, Esq., Income Tax Counsel.

For the Taxpayer, Frederick J. Miller, Esq., of Little Falls, Minn., and John L. Connolly, of St. Paul, Minn.

[fol. 139] HERBERT B. BUETOW, a witness produced in behalf of the Taxpayer, having been first duly sworn, was examined and testified as follows, to-wit:

Direct examination.

By Mr. Miller:

Q. Will you please state your name and residence and occupation?

A. Herbert B. Buetow. Residence, St. Paul, Minn., present occupation is assistant secretary and treasurer, comptroller of the Minnesota Mining and Manufacturing Company.

Q. How long have you held that position? How long have you been with the Minnesota Mining?

A. Since 1926.

Q. And will you state what positions you held with them?

A. After leaving school I was employed as cost accountant with Waldorf Paper Products. About 1916 I resigned that position and took a position with the Athletic Club, St. Paul Athletic Club, where I installed the system and supervised the accounting. Later I became associated with the Bishop Brissman Company, St. Paul, public accountants, as a staff auditor; later I was employed by the City of St. Paul to install an accounting system in the Department of Public Works. Later I again became associated with the firm of public accountants by the name of McGregor and Hines as Staff auditor. Later I was in charge of the accounting at the Elks Club. Later I was employed by the State of Minnesota in the Department of Agriculture to make audits of various creameries in the Department of Agriculture. I resigned there to become associated with the Minnesota Mining Company first as auditor and later promoted to these various positions and all this time I have done tax work, in other words for a period of about 20 years, mostly federal work and some state work in the [fol. 140] interim at various times.

Commissioner Gunderson: What time did you go to the Minnesota Manufacturing?

A. 1926, February 1926.

Q. Will you please state your duties at the present time as an officer of the Minnesota Mining Company?

A. Well, I have direct control over the entire accounting cost and statistical department and financial records and indirect supervision over the entire office consisting of about 225 people.

Q. Are all the books and records and accounts of the Minnesota Mining Company kept under your supervision?

A. Yes sir.

Q. Do you hold any other positions in the auditing world?

A. Well, I am a member of the Comptrollers Institute of America, and at the present time I am the president of the Twin Cities Chapter or Control—Twin City Control, that is the name of the chapter. This institute permits membership of comptrollers of companies whose assets exceed about a million dollars throughout the United States.

Q. Mr. Buetow, have you had compiled a statement as to the number of stockholders of the Minnesota Mining Com-

pany, the outstanding shares and number of stockholders in Wisconsin and the shares that they hold?

A. Well, I have prepared under my supervision a list showing those numbers, and if I may be permitted to refer to some figures here—I couldn't remember them all.

Q. Will you please state what those figures were as to the number of stockholders, the number of shares that were outstanding on January 1st, 1936.

A. 1961.

Q. How many shares did they own?

A. 961,260.

[fol. 141] Q. How many stockholders resided in the State of Wisconsin?

A. 42.

Q. How many shares of stock did they own?

A. 3006.

Q. Have you computed the number of stockholders who since January 1st, 1936, have sold their stock?

A. There is 347.

Q. And how many shares of stock did they own?

A. 138,747.

Q. And can you tell me the number of stockholders in Wisconsin who sold their stocks since January 1st, 1936?

A. 20.

Q. And how many shares of stock did they own?

A. 1377.

Q. Do you know the number of shares of stockholders in Wisconsin on January 1st, 1938?

A. 44.

Q. And how many shares of stock did they own?

A. 4944.

Q. Where does Minnesota Mining Company operate a factory in the state of Wisconsin?

A. At Wausau, Wisconsin.

Q. And what do you manufacture there?

A. Roofing granule, that is the name used by the roofing trade and is the so called granule which is placed on top of the asphalt to preserve the asphalt on a composition roof.

Q. And where does the factory ship its products?

A. The Wausau plant ships to Chicago and points west and west of Chicago.

Q. And by whom are the sales from the Wausau plant handled and where does he reside?

A. Mr. Voss is the sales manager in charge of the colored [fol. 142] quartz which is the trade name of the product. He contacts the various roofing companies and gets the orders for their requirements for a period of about six months in advance. He sends those orders to St. Paul and shipping instructions from the roofing companies are sent to St. Paul where decision is made as to when the shipment shall be made. He resides in the City of Chicago and has an office in our Chicago branch.

Q. After the shipments are made how is the customer billed? How does he pay the account and where and how is the receipt of the money handled or the money handled when received?

A. The Wausau plant prepared a shipping ticket on which are shown the tonnages shipped. This ticket is sent to St. Paul where it is priced and extended and a bill sent to the customer. The customer remits directly to St. Paul and these funds are commingled with funds of other factories and other divisions of our business and are deposited in the St. Paul bank. These funds may be used to pay all bills and royalties and dividends.

Q. How are the wages to the employees of the Minnesota Mining Company at Wausau paid?

A. The pay roll cards so-called time cards, are prepared at the Wausau plant and sent to St. Paul, who make the extensions and checks are drawn, signed by an officer at St. Paul and then sent to the Wausau plant manager for distribution. The checks are drawn on a Wausau bank. A deposit is made on the same day in equal amount of the total of the pay roll at that bank in Wisconsin.

Q. Where does the Minnesota Mining Company operate factories outside of the factory at Wausau, Wisconsin?

A. At Detroit, Michigan, and Copley, Ohio. Copley is a suburb of Akron.

Q. And St. Paul?

A. And St. Paul.

[fol. 143] (Testimony at record pages 392-394 concerns Baeder-Adams loss and is omitted.)

Q. Did the Minnesota Mining Company receive in the year 1935 any interest from Federal securities?

A. Yes.

Q. Can you tell us the amount of it?

A. In the year 1935 they received \$10,191.37.

Q. Did they receive any interest from Federal securities in the year 1936?

A. Yes, \$14,331.65.

Q. Now, these Federal securities—where are those bonds or securities actually kept?

A. In a vault at the bank of St. Paul.

Q. And where are the coupons actually clipped from the bonds, and cashed?

A. They are clipped at the bank in St. Paul and deposited in the St. Paul bank for collection.

Q. No part of the interest is received, paid, or deposited in the State of Wisconsin?

A. No sir.

Q. Now, did the Minnesota Mining Company in the year 1935 receive any other interest or dividends?

A. Yes.

Mr. Best: I fail to see the materiality of that. It is conceded, Mr. Miller, isn't it, that no interest or dividends was included in Wisconsin income by the auditor?

Mr. Miller: I think that is correct.

Commissioner Gunderson: Then how is it material?

Mr. Miller: We contend it is material because it reflects the income to the State of Wisconsin; the way the auditor computed this tax we propose to show which was earned outside of Wisconsin.

[fol. 144] Commissioner Gunderson: There is no dispute as to the correctness of the Wisconsin income as determined by the auditor?

Mr. Miller: That is correct.

Mr. Best: No dispute as to the Wisconsin income.

Mr. Connolly: That is correct.

Mr. Miller: Except as far as this loss is concerned, yes.

Mr. Best: And in that Wisconsin income there is no interest or dividends or royalties?

Mr. Miller: Correct.

Commissioner Conway: I don't believe that is material in this case.

Mr. Miller: May I make an offer of proof then? I would like to prove certain facts in reference to this.

Commissioner Conway: Offer proof of what?

Mr. Miller: To prove certain facts by this witness.

Commissioner Conway: Oh certainly. The question you just asked indicates that is immaterial.

Mr. Miller: Yes, I understand it is sustained as being immaterial.

Commissioner Conway: Yes.

Exception.

Mr. Miller: Then we would like to prove by this witness during the year 1935 the Minnesota Mining Company received dividends of \$328,096.23, received interest from other than Federal securities of \$27,125.17, and received interest on state obligations of \$173.25. And now is the Commission's ruling the same? I would like to ask Mr. Buétow this question:

Q. Mr. Buétow, in the year 1936 did the Minnesota Mining Company have interest receipts and dividend receipts other than Federal securities?

Mr. Best: The same objection.

[fol. 145] A: Yes.

Commissioner Conway: The same ruling.

Exception.

Mr. Miller: May I now offer to prove by this witness that in the year 1936 the Minnesota Mining Company received from dividends \$254,834, and interest from obligations other than United States securities of \$7797.53? Will the Commission kindly rule as to whether those offers are rejected and then we can go on.

Commissioner Gunderson: We have so ruled, haven't we?

Mr. Miller: You object to the offer, I suppose?

Mr. Best: As I understand, yes; you have offered—you asked the witness a question and I have objected and the objection has been sustained and your objection is preserved under the rules of practice before the Commission. Now you have made an offer of proof and I will object to that offer.

Commissioner Conway: We sustained your objection.

Mr. Miller: Don't you have to sustain it again?

Commissioner Gunderson: We can do that.

Commissioner Mount: The offer is rejected.

Mr. Best: The facts which you wanted to show are now in the record.

Mr. Miller: Yes.

Mr. Connolly: That is all.

Mr. Miller:

Q. Now, Mr. Buetow, the interest from these obligations other than Federal obligations which you have already testified to, was received by the Minnesota Mining and Manufacturing Company where?

Mr. Best: I object to that also; that should be included in your offer of proofs.

Mr. Miller: If that is the Commission's ruling. To make my position clear here, might it please the Commission, I [fol. 146] would like to show by several questions from this witness that these securities have a business situs outside of the State of Wisconsin.

Commissioner Conway: Is that in dispute?

Mr. Best: I will stipulate that there is no contention on the part of the Income Tax Division and on the part of the State that any securities or any intangibles of this taxpayer have a situs in the State of Wisconsin. That, of course, is evident from the fact that no income from such intangibles has been included in Wisconsin income by the auditor.

Commissioner Conway: Doesn't that answer your purpose?

Mr. Miller: I think that covers that.

Commissioner Mount: You stipulate that without conceding the materiality of it?

Mr. Best: Yes.

Mr. Miller:

Q. Now, Mr. Buetow, has the Minnesota Mining and Manufacturing Company in the year 1935 and in the year 1936 any income from royalties and patents owned by it?

Mr. Best: Same objection.

Commissioner Conway: What is the basis of your objection?

Mr. Best: On the ground of materiality; relevancy; goes to the same questions exactly as involved in the interest matter.

Commissioner Mount: That is, the record shows that was not an element considered in ascertaining Wisconsin income.

Mr. Miller: May I show the facts and then you will stipulate the same thing to show how much they were?

Mr. Best: You make an offer of proof as to the royalties as you did for the interest.

Mr. Miller: Was the objection sustained?

Commissioner Conway: It wasn't taken into consideration.

Mr. Best: Counsel has already stated that no income [fol. 147] and no royalties was included in the Wisconsin income.

Commissioner Conway: We will have to sustain the objection.

Exception.

Mr. Miller: The Minnesota Mining Company offers to prove by this witness that in the year 1935 it received royalties from patents owned by it of \$154,447.53, of which \$224.20 was from earnings in Wausau, Wisconsin, leaving a balance of \$154,223.33 earned by the taxpayer or received by the taxpayer from earnings outside of the State of Wisconsin.

Mr. Best: Just a minute please—off the record.

(Discussion off the record).

(Offer of proof read).

Mr. Best: Is it the taxpayer's position then, Mr. Miller, that this item of \$200 of royalties were received on an intangible which had a business situs in Wisconsin?

Mr. Miller: No, we want to be absolutely accurate in these statements. Every other dollar of this 154 thousand was earned from these patents, earned from outside the State of Wisconsin. That possibly was earned in Wisconsin and possibly not. We contend the business situs is in St. Paul and we want to be fair in this statement. Is that correct?

Mr. Connolly: That is correct.

(Discussion off the record).

Mr. Best: Now, I object to the offer of proof.

Commissioner Conway: Sustain the objection.

Exception.

Mr. Miller: The taxpayer offers to prove by this witness that in the year 1936 it received earnings from royalties on patents of \$153,623.35 of which \$144.76 was from the royalties used in the color quartz operations at Wausau, Wisconsin, leaving a balance of \$153,478.59 which was from royalties earned outside, clearly outside the State of Wisconsin.

[fol. 148] Mr. Best: The same objection.

Commissioner Conway: Objection sustained.

Exception.

(Discussion off the record).

Mr. Best: Without prejudice as to our position, as to materiality, we stipulate that these intangibles from which the royalties were derived had no business situs in Wisconsin.

Mr. Miller:

Q. Mr. Buetow, have you checked the Commission's figures as to the amount of dividends paid in the year 1936 with the actual payments?

A. Yes, I have.

Mr. Best: If the Commission please, Exhibit 3, the audit report, shows in schedule 3 a summary of the amounts of dividends paid in the year 1936, the amounts are shown with respect to the dividends paid on April, July, and October 1st, 1936, and on December 22nd, 1936, include dividends paid on treasury stock to the amount of \$1866.25.

Mr. Miller: Correct.

Mr. Best: That is the total for those four dividends. The dividends shown in schedule 3 of Exhibit 3 as being paid on January 2, 1936 thereon and include an amount of \$371.25 representing a dividend on treasury stock which was paid on that day.

Mr. Miller: That is correct. It is our contention we shouldn't be taxed on these treasury stock dividends.

Commissioner Conway: There is no dispute as to the facts; it is a question of law.

Mr. Best: I think, if the Commission please, you ought to go into the manner in which the dividends were paid so as to show how these treasury stock amounts were arrived at.

Mr. Miller:

Q. Mr. Buetow, how were the dividends as declared by [fol. 149] the directors actually paid?

A. The First Trust Company.

Q. First Trust Company where?

A. Of St. Paul is the—

Q. Minnesota.

A. Of St. Paul, Minnesota, is the disbursing agent for dividends. We pay them a check in full for the total amount of the dividend including treasury stock. They return to us the dividend allocated to the number of shares held by the company.

Q. And this check is drawn upon which bank?

A. On the First Trust Company, the First National Bank of St. Paul.

Q. And the transfer agent actually pays the dividend to the stockholders?

A. Yes, sir.

Q. And refunds you the dividend on the treasury stock?

A. Yes, sir.

Q. None of the money which you turn over to the transfer agent at the time the dividends are paid, is drawn by checks in any Wisconsin bank?

A. Yes sir, I mean they are not drawn on any Wisconsin bank.

Q. And the directors hold no meetings in the State of Wisconsin?

A. No sir.

Q. And no dividends have ever been declared in the State of Wisconsin by the taxpayer?

A. No sir.

(Discussion off the record).

Q. The Minnesota Mining Company commenced their operations of the Wausau plant when?

A. In December 1929.

Q. The first year that they operated was in the year 1930 then?

[fol. 150] A. That is right.

Q. And have they been operating the plant ever since then?

A. Yes, sir.

Q. Have you computed a balance sheet or figures showing the statement of assets and liabilities of the Wausau plant for the years 19— on December 31st, 1934, December 31st, 1935, and December 31st, 1936?

A. Yes. We don't maintain a separate set of books but we have taken the accounts from our general ledger which pertain to our Wisconsin business.

Q. And you have prepared a memorandum to that effect?

A. Yes, sir.

Paper marked Exhibit 7, AJK.

Mr. Miller: We offer that in evidence.

Mr. Best: It hasn't been identified.

Q. Showing you, Mr. Buetow, Exhibit 7, I will ask you if that is the account showing the assets and liabilities of the Wausau plant of the Minnesota Mining Company as of December 31st, 1934, 1935, and 1936.

A. Yes, sir.

Q. And this has been prepared by you from your general ledger, your depreciation book, your inventories?

A. Yes, sir.

Mr. Miller: We offer in evidence the Exhibit 7.

Mr. Best: I have no objection to the exhibit; I would like to have an opportunity to compare the figures which the auditor has obtained. I think there are some differences.

The Witness: Well, it was on the original but these have been corrected since.

Mr. Best: And I would like to reserve the objection until we have a chance to verify it.

[fol. 151] Mr. Miller: You will know that before we leave here.

Mr. Best: We will clean that up.

Mr. Miller: May me stipulate that the income of the taxpayer for the year 1930 in the state of Wisconsin was \$2396.37?

Mr. Best: Before I stipulate to that I would like to know how it is going to become material?

Mr. Miller: We think it ties into that exhibit; those are cumulative figures.

Mr. Best: The sole purpose of this is to show the computation of the figure appearing on Exhibit 7 on the line captioned net earnings.

Mr. Miller: Yes; I won't say that is the sole purpose.

Mr. Connolly: That isn't the sole purpose but it will tie into this figure here by taking Mr. Kuhns' net income as shown, deducting the losses which come to this figure as the net income.

(Discussion off the record.)

Mr. Best: I will stipulate that is the correct 1930 income attributable to the activities in the State of Wisconsin.

Mr. Miller:

Q. Mr. Buetow, do you know what is the total income of the Minnesota Mining Company for the year, net income for the year 1930?

Mr. Best: I object to that as being immaterial.

Q. From all sources.

Commissioner Conway: You mean the total net income of the company?

Mr. Miller: Yes, from all sources.

[fol. 152] Commissioner Mount: How do you claim it is material?

Mr. Miller: We claim it is material as showing that the taxpayer is being called upon to pay a privilege dividend tax from earnings outside the State of Wisconsin in 1935.

Commissioner Mount: Is it your position that the dividends declared in 1935 relate to 1930 income?

Mr. Miller: In this particular case, yes sir.

Commissioner Gunderson: In what way?

Mr. Miller: I was going to develop by this witness in a few minutes all the income which we had received prior to 1935 has been paid out prior to 1935.

Commissioner Gunderson: Will you state that again please.

Mr. Miller: We intend to prove by this witness later all the income which this company received from its operations in Wisconsin prior to 1935 was paid out prior to 1935.

Commissioner Gunderson: In the form of dividends?

Mr. Miller: In the form of dividends, using this same formula that is in the dividend privilege tax law.

Mr. Best: That is in accordance with what the auditor has done. He said that the dividends paid in 1936—he said in accordance with the law those were paid out of 1935 income.

Mr. Connolly: That is correct.

Mr. Miller: May be I didn't make myself clear. It is our contention, we started to work here in 1930 and that we earned certain moneys in 1930 and subsequent years and sustained certain losses. That the net income which the company received prior to January 1st, 1935 was distributed prior to January 1st, 1935 by applying the same basis or the same formula, that is in this privilege dividend tax law, and therefore, we have to show—we want to show all the materiality—it is necessary for us to show these facts to produce such a conclusion.

[fol. 153] Mr. Best: Suppose, to expedite matters, this material can go in subject—that is, that I reserve the objection in this matter; let it go in and see how it can be tied up with audit report. I don't follow counsel at the present time and I reserve the right to object to it.

Commissioner Conway: Well, up to the present time it doesn't appear that it is material.

Mr. Miller: Well, is the objection sustained then?

Mr. Best: I offered to reserve my objection, if that meets with the Commission's approval.

Commissioner Gunderson: I should think it should be received subject to the objection.

Commissioner Conway: The only thing we can do is go ahead with that.

Mr. Miller:

Q. Will you state then what the total income of the Minnesota Mining Company from all sources was in the year 1930?

A. \$685,707.54.

Q. Did the Minnesota Mining Company have any income in Wisconsin or attributable to Wisconsin prior to 1930?

A. No sir.

Commissioner Mount: I didn't hear that.

A. No sir.

Mr. Miller: May it be stipulated then that the net income of the Minnesota Mining Company for Wisconsin for the year 1931 was \$11,527.69, and the total income of the taxpayer from all sources for the same year was \$649,547.09? That in the year 1932 the taxpayer had no income in the State of Wisconsin but sustained a net loss

of \$920.77 and during that same year 1932 the total income of the taxpayer was \$448,588.07. That in the year 1933 the Minnesota Mining Company had an income in the State of Wisconsin of \$10,212.78, and a total income [fol. 154] from all sources of \$899,829.21. That in the year 1934 the taxpayer had no income in the State of Wisconsin, but a net loss of \$15,216.23, and in the same year 1934 the total income of the taxpayer from all sources was \$1,203,820.30. Is that correct, Mr. Best?

Mr. Best: How about taking the other year?

Mr. Connolly: That 1935 is in.

Mr. Best: 1935 is in but not 1936.

Mr. Connolly: 1936 hasn't entered the picture yet.

Mr. Best: You have offered to prove 1936 figures with respect to royalties and with respect to interest. Now, if it is material, certainly the 1936 income is.

Mr. Connolly: That is all right, we have no objection.

Mr. Best: Why not add 1935 and 1936 to your stipulation.

Mr. Miller: That in 1935 the Minnesota Mining Company had a net income in Wisconsin of \$261,157.62 subject to an offset for the previous year's loss and a total income from all sources of \$1,764,460.30.

Mr. Best: The computation of which is shown in the stipulation.

Mr. Connolly: That \$633,000 is in dispute.

Mr. Best: Yes, the manner in which this \$764,460 item was arrived at from the book income is shown in the stipulation.

Mr. Connolly: No, not from the book income.

Mr. Best: Yes.

Mr. Connolly: That is the way it is arrived at but that isn't book income.

Mr. Miller: Paragraph two shows the book income, we contend.

Mr. Best: Well, suppose we add at this point then, in computing the total income you have just given for the [fol. 155] year 1935, there was deducted an amount of \$633,656.66 which was the loss computed by the auditor to have been sustained in the Baeder Adamson Paper Mills, Incorporated, stock.

Mr. Miller: Yes, in that year.

Mr. Best: In that year.

Mr. Miller: While the taxpayer contends that the loss of 243 thousand sustained in that year—that the taxpayer, Minnesota Mining Company derived a net income from its Wisconsin operations in the year 1936 of \$183,521.31 and a total income from all sources of \$3,064,903.

Mr. Best: Those figures are agreed to as being correct with the two explanatory notes which are included in the stipulation.

Commissioner Mount: And without conceding the materiality.

Mr. Best: That is right.

Commissioner Mount: As to the years prior to 1935.

Mr. Best: And as to 1936.

Mr. Miller:

Q. Now, Mr. Buétow, will you tell me the amount of dividends which the Minnesota Mining Company paid in the year 1931?

A. 548.

Mr. Best: Same objection as to the materiality here, that is understood.

Mr. Miller: Received subject to the objection?

Mr. Best: Yes.

Commissioner Conway: Just what do you mean?

Mr. Miller: The Commission can rule on the objection afterwards.

Mr. Best: I will withdraw the objection if the taxpayer shows the evidence is material.

Commissioner Conway: You have the privilege to object later, after you examine it, is that it?

Mr. Best: That is what I requested but Commissioner Gunderson suggested the evidence be received subject to the objection.

Commissioner Conway: Is that what the "subject to the objection" means, that you have the right to examine it? We may rule on it at that time.

Mr. Best: I think that is our understanding.

The Witness: \$548,178.60.

Mr. Miller:

Q. What were the dividends paid by the Minnesota Mining Company in the year 1932?

A. \$500,001.66.

Q. What were the dividends paid in the year 1933?

A. \$381,071.48.

Q. What were the dividends paid in the year 1934?

A. \$566,671.61.

Q. What were the dividends paid in the year 1935?

A. \$690,738.54.

Q. In those computations of dividends, have you included the dividends paid upon the treasury stock or have you deducted that from those figures?

A. I have deducted the dividends on treasury stock.

Q. On January 1st, 1935, have you made any computations and can you tell the Commission as to whether or not any earnings of the State of Wisconsin—from the State of Wisconsin which you made in prior years had been retained by you or had all been distributed to the stockholders, if the same formula for determining what was the Wisconsin share of the dividends had been used?

[fol. 157] A. This computation would show that there wasn't any income remaining on that date.

Q. On January 1st, 1935, it had all been distributed prior to that time on this basis?

A. Yes, with the assumption that—in other words, can I change that. We did not include in this computation the income—we did not include in this computation the dividends paid out in the two years in which no income was earned in Wisconsin but dividends were paid by the company.

(Answer of the witness read by the reporter.)

The Witness: I should change that. It is including instead of is not. May be I better restate the whole thing here. Will you ask the question again.

Last question read by the reporter.

A. If I can restate that answer I would like to do it this way: Our computation shows that there is an excess of approximately \$6000 without taking into account that share of the dividends which should be allocated according to the formula in those two years in which we sustained losses in Wisconsin.

Mr. Connolly: Name those.

A. In 1932 and 1934.

Q. And in those years how much was the total dividend you paid?

A. In the year—total dividend is \$1,071,812.62.

Q. You paid that in the succeeding years, you paid a third of that in 1933 and 1935?

A. That is right.

[fol. 158]. Cross-examination.

By Mr. Best:

Q. You have before you, Mr. Buetow, some sort of tabulation from which you have just given some figures?

A. Yes sir.

Q. I understand what you have done in making this computation, Mr. Buetow, is for the years in which net income was derived from Wisconsin activities you have taken the ratio of that net income to the total net income of the company for the same year?

A. Yes sir.

Q. And applied that percentage to the dividends paid in the succeeding year?

A. Yes sir.

Q. And by that means you have allocated certain dividends?

A. Yes sir.

Q. To Wisconsin earnings.

A. Yes sir.

Q. Now, the sum of those dividends plus the losses sustained from Wisconsin operations exceed the total income from Wisconsin operations by about \$6000?

A. More than that. That six thousand was the excess of income over dividends without taking into account any distribution from this million dollars.

Q. The excess of the dividends over the income, not the excess of income over dividends?

A. No, this shows a slight excess, income over dividends.

Q. And the income exceeded the dividends in those four years by six thousand dollars?

A. Yes sir.

[fol. 159] Q. The losses in Wisconsin were—

A. About \$16,000; you want the exact figure?

Q. About sixteen thousand, which would leave a deficit from Wisconsin operations of about \$10,000 according to your calculation?

A. Yes sir.

Q. Without considering the dividends paid in the two loss years?

A. Yes sir.

Mr. Miller: And, without considering this dividend of \$1,078,812.62 paid in 1933 and 1935.

A. Yes, I answered that.

(Testimony at record pages 412-413 concerns Baeder Adamson loss and is omitted.)

Q. You testified to the amount of interest from government securities, Federal securities which Minnesota Mining and Manufacturing Company received in 1935; that was the amount of ten thousand some odd dollars?

A. Yes sir.

Q. That \$10,000 was included in the total income?

A. Yes sir.

Q. In the auditor's privilege dividend tax report?

A. Yes sir.

Q. The same thing is true of interest and royalties received in that same year?

A. Yes sir.

Q. That is included in the total income also. Now, your office, the comptroller's office prepares balance sheets and profit and loss statements for this corporation?

A. Yes sir.

Q. And in those statements the treasury stock is shown [fol. 160] as an asset under the heading of miscellaneous investments?

A. Yes sir.

Q. And appears on the liability side of the balance sheet as outstanding capital stock?

A. Yes sir.

Q. And that same method of treatment of treasury stock is followed in the annual reports made to the stockholders?

A. Yes sir.

[fol. 161]

EXHIBIT No. 5

Minnesota Mining & Manufacturing Company

St. Paul, Minnesota

2nd Revised Recomputation of
 Privilege Dividend Tax Liability
 On Dividends Paid

During the Years 1935 and 1936

By

Wisconsin Department of Taxation

October 15, 1941.

MEK.

[fol. 162] Minnesota Mining & Manufacturing Company

St. Paul, Minnesota

2nd Revised: Table of Contents

	Page
Schedule 1 2nd Revised Computation of Privilege Dividend Tax	64
Schedule 2 2nd Revised Computation of Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin	65
Schedule 3 2nd Revised Summary of Dividends Paid 9/26/35-12/31/36	66
Exhibit C-1 2nd Revised Reconciliation of Surplus And C-2 per Books With Book Income and Corrected Total Income	66A
Exhibit D 2nd Revised Reconciliation of Surplus per Books With Corrected Surplus	66A
Exhibit D-1 2nd Revised Reconciliation of Corrected Surplus Beginning of Year with Corrected Surplus End of Year	66A

[fol. 163]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

	Schedule 3	1/2/36	4/1/36	7/1/36	10/1/36	12/22/36	Total
Dividend Paid							
Amount of Dividend Paid							
Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin							
Amount of Dividend Taxable	Schedule 2	5.2874	5.2874	5.2874	5.2874	5.2874	
Rate of Tax		\$ 11,416.02	\$ 11,421.30	\$ 15,216.24	\$ 17,758.44	\$ 33,014.34	\$ 88,826.34
Privilege Dividend Tax		\$ 285.40	\$ 285.53	\$ 380.41	\$ 443.96	\$ 825.36	
Tax Previously Paid		0	0	0	0	0	
Additional Privilege Dividend Tax		\$ 285.40	\$ 285.53	\$ 380.41	\$ 443.96	\$ 825.36	\$ 2,220.66
Penalty and Interest							
Total Additional							

[fol. 164]

SCHEDULE 2'

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income
Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/29	\$2,315,478.38	\$2,315,478.38	\$	
Dividends Paid in 1930....	573,058.29	573,058.29		
	1,742,420.09	1,742,420.09		
Corrected Income 1930....	591,251.89	588,855.52	2,396.37	
Surplus 12/31/30.....	2,333,671.98	2,331,275.61	2,396.37	1027
Dividends Paid in 1931....	576,131.40	575,539.71	591.69	1027
	1,757,540.58	1,755,735.90	1,804.68	
Corrected Income 1931....	657,340.62	645,812.93	11,527.69	
Surplus 12/31/31.....	2,414,881.20	2,401,548.83	13,332.37	5521
Dividends Paid in 1932....	500,001.68	497,241.17	2,760.51	5521
	1,914,879.52	1,904,307.66	10,571.86	
Corrected Income 1932....	448,540.07	449,460.84	920.77	
Surplus 12/31/32.....	2,363,419.59	2,353,768.50	9,651.09	4084
Dividends Paid in 1933....	381,179.08	379,622.34	1,556.74	4084
	1,982,240.51	1,974,146.16	8,094.35	
Corrected Income 1933....	889,734.22	879,521.44	10,212.78	
Surplus 12/31/33.....	2,871,974.73	2,853,667.60	18,307.13	6374
Dividends Paid in 1934....	566,671.61	563,059.65	3,611.96	6374
	2,305,303.12	2,290,607.95	14,695.17	
Corrected Income 1934....	1,222,640.30	1,238,056.53	15,216.23	
Surplus 12/31/34.....	3,528,143.42	3,528,664.48	521.06	
Dividends Paid in 1935....	474,828.71	474,828.71		
	3,053,314.71	3,053,835.77	521.06	
Corrected Income 1935....	1,876,110.22	1,614,952.60	261,157.62	
Surplus 12/31/35.....	4,929,424.93	4,668,788.37	260,636.56	5.2874
Dividends Paid in 1936....	1,679,962.55	1,591,136.21	88,826.34	5.2874
	3,249,462.38	3,077,652.16	171,810.22	
Corrected Income 1936....	3,064,903.00	2,881,381.69	183,521.31	
Surplus 12/31/36.....	\$6,314,365.38	\$5,959,033.85	\$355,331.53	

[fol. 165] Minnesota Mining and Manufacturing Company

Schedule 3

2nd Revised Summary of Dividends Paid 9/26/35—
12/31/36

Date Paid	Amt. of Dividend
1/ 2/36	\$ 215,909.83
4/ 1/36	216,009.72
7/ 1/36	287,783.00
10/ 1/36	335,863.50
12/22/36	624,396.50
Total Dividends Paid in 1936	<u>\$1,679,962.55</u>

(Here follows 1 paster, side folios 166, 167, 168)

[fol. 166]

EXHIBIT C-1 AND C-2

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Book Income and Corrected Total Income

	1930	1931	1932	1933	1934	1935	1936
Surplus Balance—End of Year	\$2,034,840.35	\$2,109,798.63	\$2,068,626.59	\$2,139,739.28	\$2,717,364.45	\$4,146,051.28	\$5,343,242.22
Surplus Balance—Beginning of Year	1,940,992.32	2,034,840.35	2,109,798.63	2,068,626.59	2,139,739.28	2,717,364.45	4,146,051.28
Increase	\$ 93,848.03	\$ 74,958.28	\$ 41,172.04	\$ 71,112.69	\$ 577,625.17	\$1,428,686.83	\$1,197,190.94
Dividends Received on Treasury Stock		624.60	4,652.76	3,410.81	10,079.66	6,167.74	1,866.25
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Federal Income Tax	79,513.94	87,000.00					
Federal Tax Refund		10,697.60		18,933.26			
Depreciation Adjustment—Prior Years		12,043.53					
Loss on O. A. P. Mills Stock				71,460.00			
Write Down—B. A. P. Mills Stock				371,656.66			
Patent Amortization				10,074.99			
Federal Income Taxes (Reversed)	79,513.94	87,000.00					
Loss on Baeder Adamson Paper Mills, Inc. Stock		116,190.00				243,000.00	
Dividend on Unlocated Stock	166.71						
Premium on Debenture Bonds Called		4,250.00					
Book Income per Surplus Account	\$ 666,906.32	\$ 748,788.55	\$ 458,829.64	\$ 886,550.16	\$1,144,296.78	\$2,362,425.37	\$2,661,243.66
Audit Adjustments—Premium on Debenture Bonds		4,250.00					
Life Insurance Premiums	1,841.54	3,866.14	3,900.00	3,943.35	4,038.55	4,195.85	4,205.29
Loss on B. A. P. Mills Stock		116,190.00		71,460.00	19,000.00	633,656.66	
Federal Tax Refund		10,697.60		18,933.26			
Reserve for Federal and State Taxes	79,513.94	87,000.00	72,500.00	136,098.00	182,327.00	350,000.00	675,000.00
Federal and State Taxes Paid	157,009.91	84,615.20	86,689.57	74,255.56	126,822.03	206,854.34	275,545.95
Patents Charged Off				10,074.99			
Depreciation Adjustments Through Surplus		12,043.53					
Net Adjusted Income (On Wisconsin Income Tax Basis)	\$ 591,251.89	\$ 657,340.62	\$ 448,540.07	\$ 889,734.22	\$1,222,840.30	\$1,876,110.22	\$3,064,903.00

[fol. 167]

EXHIBIT D

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Corrected Surplus

	12/31/29	12/31/30	12/31/31	12/31/32	12/31/33	12/31/34	12/31/35	12/31/36
Surplus per Books	\$1,940,992.32	\$2,034,840.35	\$2,109,798.63	\$2,068,626.59	\$2,139,739.28	\$2,717,364.45	\$4,146,051.28	\$5,343,242.22
Reserve for Loss on Baeder Adamson Paper Mills Inc.					371,656.66	390,656.66		
Reserve for Bad Debts	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Reserve for Federal and State Taxes	179,486.06	101,960.09	104,374.89	90,185.32	152,027.76	207,582.73	350,678.39	750,132.44
Life Insurance Premiums Capitalized (1930-1939)		1,841.54	5,707.68	9,607.68	13,551.03	17,589.58	21,785.43	25,990.72
Reserve Crystal Bay Real Estate	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00
Corrected Surplus	\$2,315,478.38	\$2,333,671.98	\$2,414,881.20	\$2,363,419.59	\$2,871,974.73	\$3,528,143.42	\$4,713,515.10	\$6,314,365.38

[fol. 169]

EXHIBIT No. 9

**Minnesota Mining and Manufacturing Company
St. Paul, Minnesota**

2nd revised recomputation of privilege dividend tax liability on dividends paid during the year 1937 by Wisconsin Department of Taxation.

October 15, 1941. MEK.

**[fol. 170] Minnesota Mining and Manufacturing Company
St. Paul, Minnesota**

2nd Revised: Table of Contents	Page
Schedule 1—2nd Revised Computation of Privilege Dividend Tax	68
Schedule 2—2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income Derived from Property Located and Business Transacted in Wisconsin	69
Schedule 3—2nd Revised Summary of Dividends Paid 1/1/37—12/31/37	69
Exhibit C-1 and C-2—2nd Revised Reconciliation of Surplus per Books with Book Income and Corrected Total Income	70
Exhibit D—2nd Revised Reconciliation of Surplus per Books with Corrected Surplus	70
Exhibit D-1—2nd Revised Reconciliation of Corrected Surplus Beginning of Year with Corrected Surplus End of Year	71

[fol. 171]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

	Dividend Paid	Schedule 3	3/31/37	6/20/37	9/29/37	12/30/37	Total
Amount of Dividend Paid		Schedule 3	\$383,892.00	\$479,865.00	\$575,838.00	\$719,797.50	\$
Per Cent of Dividend Deducted and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin		Schedule 2	5.6274	5.6274	5.6274	5.6274	
Amount of Dividend Taxable			\$ 21,603.14	\$ 27,003.92	\$ 32,404.71	\$ 40,505.88	\$121,517.65
Rate of Tax			.025	.025	.025	.025	
Privilege Dividend Tax			\$ 540.08	\$ 675.10	\$ 810.12	\$ 1,012.65	
Tax Previously Paid			0	0	0	0	
Additional Privilege Dividend Tax			\$ 540.08	\$ 675.10	\$ 810.12	\$ 1,012.65	\$ 3,037.95
Penalty and Interest							
Total Additional			\$	\$	\$	\$	\$

[fol. 172]

SCHEDULE 2

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income
Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/36	\$6,314,365.38	\$5,959,033.85	\$355,331.53	5.6274
Dividends Paid in 1937....	2,159,392.50	2,037,874.85	121,517.65	5.6274
	<u>4,154,972.88</u>	<u>3,921,159.00</u>	<u>233,813.88</u>	
Corrected Income 1937....	3,797,049.45	3,745,921.38	51,128.07	
	<u>\$7,952,022.33</u>	<u>\$7,667,080.38</u>	<u>\$284,941.95</u>	
Surplus 12/31/37.....				

[fol. 173] Minnesota Mining and Manufacturing Company
Schedule 3

2nd Revised Summary of Dividends Paid 1/1/37—
12/31/37

Date Paid	Amt. of Dividend
3/31/37	\$ 383,892.00
6/29/37	479,865.00
9/29/37	575,838.00
12/30/37	719,797.50
	<u> </u>
* Total Dividends Paid in 1937.....	<u>\$2,159,392.50</u>

* No data on hand to determine allocation of dividends paid on Treasury Stock. Total Dividends paid was \$2,162,835.00 of which \$3,442.50 was paid on Treasury Stock. Total dividend per share paid in 1937 was \$2.25.

$\$3,442.50 \div 2.25 = 1530$ which is used as the average number of shares of Treasury Stock in determining the net quarterly dividend paid on such stock in 1937.

[fol. 174] Minnesota Mining and Manufacturing Company
Exhibit C-1 and C-2

2nd Revised Reconciliation of Surplus Per Books with
Book Income and Corrected Total Income

	1937
Surplus Balance—End of Year	\$6,683,915.78
Surplus Balance—Beginning of Year	5,343,242.22
Increase	\$1,340,673.56
Dividends Received on Treasury Stock	\$ 3,442.50
Dividends Paid	2,162,835.00
Depreciation Adjustment—Prior Years	90,981.50
Patent Amortization	110.95
Book Income per Surplus Account	\$3,408,973.61
Audit Adjustments:	
Life Insurance Premiums	\$ 4,050.54
Reserve for Federal and State Taxes	1,025,000.00
Federal and State Taxes Paid	742,067.15
Patents Charged Off	110.95
Depreciation Adjustments Through Surplus	90,981.50
Reserve for Doubtful Accounts	10,000.00
Net Adjusted Income (on Wisconsin Income Tax Basis)	\$3,797,049.45

[fol. 175] Minnesota Mining and Manufacturing Company
Exhibit D

2nd Revised Reconciliation of Surplus Per Books with
Corrected Surplus

	12/31/37
Surplus per Books	\$6,683,915.78
Reserve for Bad Debts	20,000.00
Reserve for Federal and State Taxes	1,033,065.29
Life Insurance Premiums Capitalized	30,041.26
Reserve Crystal Bay Real Estate	185,000.00
Corrected Surplus	\$7,952,022.33

[fol. 176] Minnesota Mining and Manufacturing Company

Exhibit D-1

2nd Revised Reconciliation of Corrected Surplus Beginning
of Year with Corrected Surplus End of Year

1937

Corrected Surplus Balance—Beginning of Year	\$6,314,365.38
Corrected Income	3,797,049.45
Dividends Paid	2,162,835.00
Dividends Received on Treasury Stock	3,442.50
Corrected Surplus Balance—End of Year	<u>\$7,952,022.33</u>
Income Allocated to Wisconsin and Taxed	<u>\$ 51,128.07</u>

[fol. 177]

EXHIBIT No. 13

Minnesota Mining and Manufacturing Company, St. Paul,
Minnesota

2nd Revised Recomputation of Privilege Dividend Tax
Liability on Dividends Paid During the Years 1938 to
1940, Inclusive. By Wisconsin Department of Taxation.
October 15, 1941.
MEK.

[fol. 178] Minnesota Mining and Manufacturing Company, St. Paul, Minnesota.

2nd Revised: Table of Contents

	Page
Schedule 1 2nd Revised Computation of Privilege Dividend Tax	72A
Schedule 2 2nd Revised Computation of Per Cent of Dividend Declared and Paid out of Income Derived from Property Located and Business Transacted in Wisconsin	73
Schedule 3 2nd Revised Summary of Dividends Paid 1/1/38-12/31/40	73
Exhibit C-1 And C-2 2nd Revised Reconciliation of Surplus per Books With Book Income and Corrected Total Income	74
Exhibit D 2nd Revised Reconciliation of Surplus per Books with Corrected Surplus	75
Exhibit D-1 2nd Revised Reconciliation of Corrected Surplus Beginning of Year with Corrected Surplus End of Year	75

(Here follows 1 paster, side folio 179)

72-A

[fol. 179]

SCHEDULE 1

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Privilege Dividend Tax

[illegible]

SCHEDULE 1

2nd Revised Computation of Privilege Dividend Tax

[illegible]

Increase	\$ 93,848.03	\$ 74,958.28	\$ 41,172.04	\$ 71,112.69	\$ 577,625.17	\$1,428,686.83	\$1,197,190.94
Dividends Received on Treasury Stock		624.60	4,652.76	3,410.81	10,079.66	6,167.74	1,866.25
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Federal Income Tax	79,513.94	87,000.00					
Federal Tax Refund		10,697.60		18,933.26			
Depreciation Adjustment—Prior Years		12,043.53					
Loss on O. A. P. Mills Stock				71,460.00			
Write Down—B. A. P. Mills Stock				371,656.66			
Patent Amortization				10,074.99			
Federal Income Taxes (Reversed)	79,513.94	87,000.00					
Loss on Baeder Adamson Paper Mills, Inc. Stock		116,190.00				243,000.00	
Dividend on Unlocated Stock	166.71						
Premium on Debenture Bonds Called		4,250.00					
Book Income per Surplus Account	\$ 666,906.32	\$ 748,788.55	\$ 458,829.64	\$ 886,550.16	\$1,144,296.78	\$2,362,425.37	\$2,661,243.66
Audit Adjustments—Premium on Debenture Bonds		4,250.00					
Life Insurance Premiums	1,841.54	3,866.14	3,900.00	3,943.35	4,038.55	4,195.85	4,205.29
Loss on B. A. P. Mills Stock		116,190.00		71,460.00	19,000.00	633,656.66	
Federal Tax Refund		10,697.60		18,933.26			
Reserve for Federal and State Taxes	79,513.94	87,000.00	72,500.00	136,098.00	182,327.00	350,000.00	675,000.00
Federal and State Taxes Paid	157,009.91	84,615.20	86,689.57	74,255.56	126,822.03	206,854.34	275,545.95
Patents Charged Off				10,074.99			
Depreciation Adjustments Through Surplus		12,043.53					
Net Adjusted Income (On Wisconsin Income Tax Basis)	\$ 591,251.89	\$ 657,340.62	\$ 448,540.07	\$ 889,734.22	\$1,222,840.30	\$1,876,110.22	\$3,064,903.00

[fol. 167]

EXHIBIT D

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus per Books with Corrected Surplus

	12/31/29	12/31/30	12/31/31	12/31/32	12/31/33	12/31/34	12/31/35	12/31/36
Surplus per Books	\$1,940,992.32	\$2,034,840.35	\$2,109,798.63	\$2,068,626.59	\$2,139,739.28	\$2,717,364.45	\$4,146,051.28	\$5,343,242.22
Reserve for Loss on Baeder Adamson Paper Mills Inc.					371,656.66	390,656.66		
Reserve for Bad Debts	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Reserve for Federal and State Taxes	179,486.06	101,900.09	104,374.89	90,185.32	152,027.76	207,532.73	350,678.39	750,132.44
Life Insurance Premiums Capitalized (1930-1939)		1,841.54	5,707.68	9,607.68	13,551.03	17,589.58	21,785.43	25,990.72
Reserve Crystal Bay Real Estate	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00	185,000.00
Corrected Surplus	\$2,315,478.38	\$2,333,671.98	\$2,414,881.20	\$2,363,419.59	\$2,871,974.73	\$3,528,143.42	\$4,713,515.10	\$6,314,365.38

[fol. 168]

EXHIBIT D-1

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Corrected Surplus Beginning of Year With Corrected Surplus End of Year

	1930	1931	1932	1933	1934	1935	1936
Corrected Surplus Balance—Beginning of Year	\$2,315,478.38	\$2,333,671.98	\$2,414,881.20	\$2,363,419.59	\$2,871,974.73	\$3,528,143.42	\$4,713,515.10
Corrected Income	591,251.89	657,340.62	448,540.07	889,734.22	1,222,840.30	1,876,110.22	3,064,903.00
Dividends Paid	573,225.00	576,756.00	504,654.44	384,589.89	576,751.27	696,906.28	1,465,918.97
Dividend on Unlocated Stock	166.71						
Dividend Received on Treasury Stock		624.60	4,652.76	3,410.81	10,079.66	6,167.74	1,866.25
Corrected Surplus Balance—End of Year	\$2,333,671.98	\$2,414,881.20	\$2,363,419.59	\$2,871,974.73	\$3,528,143.42	\$4,713,515.10	\$6,314,365.38
Income Allocated to Wisconsin and Taxed	\$ 2,396.37	\$ 11,527.69	\$ 920.77	\$ 10,212.78	\$ 15,216.23	\$ 261,157.62	\$ 183,521.31

[fol. 180]

SCHEDULE 2

Minnesota Mining and Manufacturing Company

2nd Revised Computation of Per Cent of Dividend Declared and Paid Out of Income
Derived From Property Located and Business Transacted in Wisconsin

	Total	Outside	Wisconsin	Per Cent Wisconsin To Total
Corrected Surplus 12/31/37	\$ 7,952,022.33	\$ 7,667,080.38	\$284,941.95	3.5833
Dividends Paid in 1938	1,730,268.00	1,668,267.31	62,000.69	3.5833
	6,221,754.33	5,998,813.07	222,941.26	
Corrected Income 1938	3,233,970.80	2,883,398.83	350,571.97	
Surplus 12/31/38	9,455,725.13	8,882,211.90	573,513.23	6.0652
Dividends Paid in 1939	2,307,024.00	2,167,098.38	139,925.62	6.0652
	7,148,701.13	6,715,113.52	433,587.61	
Corrected Income 1939	4,660,233.88	4,436,784.76	223,449.12	
Surplus 12/31/39	\$11,808,935.01	\$11,151,836.28	\$657,036.73	5.5639
Dividends Paid in 1940	2,307,024.00	2,178,663.49	128,360.51	5.5639
Balance of 12/31/39 Surplus after Deduction of 1940 Dividends	\$ 9,501,911.01	\$ 8,973,234.79	\$528,676.22	

[fol. 181]

SCHEDULE 3

Minnesota Mining and Manufacturing Company

2nd Revised Summary of Dividends Paid 1/1/38-12/31/40

Date Paid	Amount of Dividend
3/29/38	\$ 384,504.00
6/28/38	384,504.00
9/29/38	384,504.00
12/21/38	576,756.00
Total Dividends Paid in 1938	\$1,730,268.00
3/30/39	\$ 480,630.00
6/28/39	480,630.00
9/27/39	624,819.00
12/20/39	720,945.00
Total Dividends Paid in 1939	\$2,307,024.00
3/28/40	\$ 576,756.00
6/27/40	576,756.00
9/28/40	576,756.00
12/19/40	576,756.00
Total Dividends Paid in 1940	\$2,307,024.00

Minnesota Mining and Manufacturing Company

2nd Revised Reconciliation of Surplus Per Books With
Book Income and Corrected Total Income

	1938	1939
Surplus Balance — End of Year	\$8,360,402.12	\$10,397,257.35
Surplus Balance — Beginning of Year	6,683,915.78	8,360,402.12
Increase	\$1,676,486.34	\$ 2,036,855.23
Dividends Paid	1,730,268.00	2,307,024.00
Write-Down of Patents		21,096.02
Book Income Per Surplus Account	\$3,406,754.34	\$ 4,364,975.25
Audit Adjustments:		
Life Insurance Premiums	\$ 4,127.75	\$ 5,796.18
Reserve for Federal and State Taxes	840,000.00	1,090,000.00
Federal and State Taxes Paid	1,017,653.19	815,186.90
Patents Charged Off		19,561.90
Patent Amortization Deductible		4,170.65
Deposit on Wisconsin Income Tax	741.90	741.90
Net Adjusted Income (On Wisconsin Income Tax Basis)	\$3,233,970.80	\$ 4,660,233.88

[fol. 183]

EXHIBIT D

Minnesota Mining and Manufacturing Company
2nd Revised Reconciliation of Surplus Per Books With
Corrected Surplus

	12/31/38	12/31/39
Surplus Per Books	\$8,360,402.12	\$10,397,257.35
Reserve for Bad Debts	20,000.00	20,000.00
Reserve for Federal and State Taxes	855,412.10	1,130,225.20
Patent Expense Written Off Restored		40,657.92
Amortization of Patent Expense		4,170.65
Deposit on Wisconsin Income Tax	741.90	
Life Insurance Premiums Capitalized	34,169.01	39,965.19
Reserve Crystal Bay Real Estate	185,000.00	185,000.00
Corrected Surplus	<u>\$9,455,725.13</u>	<u>\$11,808,935.01</u>

[fol. 184]

EXHIBIT D-1

Minnesota Mining and Manufacturing Company
2nd Revised Reconciliation of Corrected Surplus Beginning
of Year With Corrected Surplus End of Year

	1938	1939
Corrected Surplus Balance—		
Beginning of Year	\$7,952,022.33	\$9,455,725.13
Corrected Income	3,233,970.80	4,660,233.88
Dividend Paid	1,730,268.00	2,307,024.00
Corrected Surplus Balance—		
End of Year	<u>\$8,455,725.13</u>	<u>\$11,808,935.01</u>
Income Allocated to Wisconsin and Taxed	<u>\$350,571.97</u>	<u>\$223,449.12</u>

WISCONSIN BOARD OF TAX APPEALS, MADISON, WISCONSIN

Docket Nos. D-43, D-614, and D—

MINNESOTA MINING & MANUFACTURING COMPANY, Petitioner,

VS.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

STIPULATION OF FACTS

It is hereby stipulated by and between the Wisconsin Department of Taxation and the Minnesota Mining and Manufacturing Company, a corporation, that in determination of the above appeals before the Board the following facts are admitted:

I

Petitioner brings this case before the Board contesting the validity of respondent's proposed assessments alleged to be due the State of Wisconsin from petitioner for privilege dividend taxes on dividends paid during the years 1936, 1937, 1938, 1939 and 1940. The question of whether or not petitioner was liable for privilege dividend tax on dividends paid in 1936 was before the Supreme Court of the State of Wisconsin in the case of Minnesota Mining & Manufacturing Company v. Wisconsin Tax Commissioner, State of Wisconsin, and Emer E. Barlow as Commissioner of Taxation for the State of Wisconsin; and under date of May 20, 1941 the Supreme Court entered its decision, order and judgment reversing the judgment of the Dane County Court with directions to remand the record to the Commissioner of Taxation for further proceedings as indicated in the opinion of the Court.

[fol. 186] All steps necessary to be performed by the respondent and petitioner to bring before this Board the question of the petitioner's liability for privilege dividend taxes on dividends paid during the years 1936 and 1937 and from Mar. 29, 1938 to and including December 19, 1940, have been performed.

The following is a statement of the principal amounts of the privilege dividend taxes respondent claimed to be due and owing from petitioner as involved in this hearing:

Privilege Dividend Tax on Dividends Paid During:	In the Amount of:
1936	\$2,220.66
1937	3,237.75
1938 to 1940	9,390.16

II

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the City of Saint Paul, State of Minnesota, operating a factory manufacturing Colorquartz at Wausau, Wisconsin. The First Trust Company of Saint Paul is the transfer agent for the petitioner. All dividends were declared at meetings of the Board of Directors in Saint Paul; no dividends were declared in Wisconsin; all dividends paid by the petitioner during the period affected by the taxes in question were paid to the transfer agent in Saint Paul by a check drawn on a Saint Paul bank and by it distributed to the stockholders of the petitioner.

Petitioner operates a factory at Wausau, Wisconsin, manufacturing roofing granules (known to the trade as "Colorquartz"). This factory ships its products to Chicago and points west. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago. He contacts various roofing companies and gets orders for roofing [fol. 187] granules, send the orders to Saint Paul, and shipping instructions are sent from roofing companies to Saint Paul where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. This ticket is sent to Saint Paul where it is priced and the bill sent from Saint Paul to the consumer. The consumer remits directly to Saint Paul, and those funds are commingled with funds from other factories and other divisions of petitioner's business, and are deposited in Saint Paul banks. These funds are used to pay all bills, royalties and dividends. The employees of petitioner are paid on time cards prepared at the Wausau

plant and sent to Saint Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at Saint Paul and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. The petitioner operates factories at Detroit; Michigan; Copley, Ohio; and Saint Paul, Minnesota.

III

From September 26, 1935 up to and including December 31, 1940, petitioner declared and paid the following amounts as dividends:

Date paid	Amount of dividend	Total
1/2/36	\$215,909.83	
4/1/36	216,009.72	
7/1/36	287,783.00	
10/1/36	335,863.50	
12/22/36	624,396.50	
		<hr/> \$1,679,962.55
3/31/37	383,892.00	
6/29/37	479,865.00	
9/29/37	575,838.00	
12/30/37	719,797.50	
		<hr/> 2,159,392.50
[fols. 188-192]		
3/29/38	384,504.00	
6/28/38	384,504.00	
9/29/38	384,504.00	
12/21/38	576,756.00	
		<hr/> 1,730,268.00
3/30/39	480,630.00	
6/28/39	480,630.00	
9/27/39	624,819.00	
12/20/39	720,945.00	
		<hr/> 2,307,024.00
3/28/40	576,756.00	
6/27/40	576,756.00	
9/28/40	576,756.00	
12/19/40	576,756.00	
		<hr/> 2,307,024.00

IV

During the years 1935, 1936, 1937, 1938 and 1939 and 1940 petitioner's Board of Directors adopted the following resolutions on the specific dates hereinafter mentioned:

December 16, 1935:

"Resolved, that the Board of Directors of the Corporation do hereby declare from the surplus earnings of the corporation and/or surplus available for dividends, a quarterly dividend of seventeen and one-half cents (\$0.17½) and five cents (\$0.05) extra on each share of its capital stock without par value issued and outstanding (except to such shares of stock as have been purchased by the corporation and are held by it as Treasury stock) payable on the second day of January, 1936, to holders of record of such stock at the close of business on the twentieth day of December, 1935."

[Dividend resolutions for years 1936 to 1940 inc. omitted from this print because they are substantially the same as the December 16, 1935 dividend resolution.]

[fol. 193] Said dividends were paid pursuant to Section 34 of the Delaware Corporation Law, which reads as follows:

"The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27, and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year."

and pursuant to a subsequent section which provides:

"No corporation created under the provisions of this Chapter, nor the Directors thereof, shall pay dividends upon any shares of the corporation except in accordance with the provisions of this Chapter."

The petitioner and respondent shall have the right at the hearing before this Board to introduce additional evi-

dence with respect to the issues involved on these petitions to review.

Dated, this 17 day of November, 1941.

Minnesota Mining & Manufacturing Co., by John L. Connolly and G. Burgess Ela by G. Burgess Ela.
Wisconsin Department of Taxation, by Elmer E. Barlow, Richard R. Teschner.

[fol. 194] BEFORE WISCONSIN BOARD OF TAX APPEALS

Docket Nos. D-43, D-614, D-624

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware corporation, Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

DECISION AND ORDER—February 13, 1942

Three cases, all involving assessments of Wisconsin privilege dividend taxes, are here consolidated for the purpose of determination. They are appeals from the assessment of such taxes by the Wisconsin Tax Commission and its successor, the respondent, for the years 1936 to 1940, inclusive, and from the denial by the respondent of petitioner's application for abatement thereof in each case. These appeals pertain to taxes alleged to be due on dividends paid as follows: D-624 in the year 1936; D-43 in the year 1937; and D-614 in the years 1938, 1939, and 1940.

We make the following findings of fact: The petitioner is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. It operated a factory at Wausau, Wisconsin, manufacturing roofing granules. It purchased this factory in 1929 and began manufacturing operations therein in 1930. Sales are made through an office in Chicago, Illinois but all orders are confirmed at the St. Paul office, and shipping instructions are forwarded from there. Purchasers of products manufactured in Wisconsin remit direct to the St. Paul office and the proceeds are there mingled with funds from sales from other factories and other divisions of petitioner's business. Checks [fol. 195] for payrolls are prepared at the St. Paul office

and are drawn on a Wausau bank. A deposit equaling the amount of the payroll is forwarded to the Wausau Bank on the same day the checks are forwarded.

The Company reports on a calendar year basis, taking an inventory and closing its books as of December 31 of each year. The Company maintains but one general surplus account and none of the earnings derived by it from property located in or business transacted in Wisconsin are segregated in any way. The petitioner does not maintain a separate balance sheet for Wisconsin operations, nor is there a separate surplus account for this state.

All dividends during the years in question were declared by the Board of Directors of the Company at meetings held in St. Paul. The First Trust Company of St. Paul is the transfer agent for the petitioner. All of the dividends paid by the petitioner during the period here under review were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and distributed to the Company's stockholders by the transfer agent. Dividends were paid from surplus, pursuant to the laws of Delaware, and not from current earnings.

The petitioner challenges the validity of the assessments made for the several years here involved and contends:

First, that the Wisconsin privilege dividend tax law is unconstitutional; Second, that the respondent's method of computing the tax is invalid; Third, that the assessments, if found to be valid, should not be subject to penalties and interest.

[fol. 196] The Wisconsin statutes here involved are Section 71.60, Section 3, (1), (2) and (4):

“(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to three per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of sub-section (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1941. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation:

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"* * *

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividends. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

In our opinion the following decisions clearly hold that the Wisconsin privilege dividend tax law is constitutional: *State ex rel. Froedtert Grain and Malting Company vs. Wisconsin Tax Commission*, 221 Wis. 225; *Minnesota Mining and Manufacturing Company vs. Wisconsin Tax Commission*, [fol. 197] 298 N. W. 186; *J. C. Penney Company vs. Wisconsin Department of Taxation, et al.*, 311 U. S. 435.

We find that the respondent's computations of privilege dividend taxes due from the petitioner were proper and valid and complied with that statute as construed by the Wisconsin Supreme Court in *Minnesota Mining and Manufacturing Company*, supra. Appeal of *International Harvester Company*. WBTA (decided February 13, 1942).

The privilege dividend tax law requires every corporation liable under the law to make a return thereof and pay the tax to the respondent on or before the last day of the month following the payment of dividends. There is no

statutory provision for the waiver of interest and penalties and in our opinion the amounts due from the petitioner during the years in question as recomputed by the respondent are subject to the interest and penalties prescribed by law. *Laabs. vs. Tax Commission*, 218 Wis. 414.

We find the correct assessment for the several periods here involved to be:

D-624	1936	\$2,220.66
D-43	1937	3,037.75
D-614	1938, 1939, 1940	9,307.08

To the above amounts interest and penalties are to be added as provided by law.

IT IS ORDERED:

That the additional assessments appealed from be and the same are hereby modified to conform to the findings announced herein, and as so modified, the assessments are hereby affirmed.

[fol. 198] Dated at the State Capitol, Madison, Wisconsin, this 13th day of February, 1942.

Wisconsin Board of Tax Appeals. G. L. Broadfoot,
Chairman; W. J. Conway, Harry Slater.

[fol. 199] IN CIRCUIT COURT OF DANE COUNTY

In the Matter of

MINNESOTA MINING AND MANUFACTURING COMPANY

Wisconsin Privilege Dividend Taxes

NOTICE OF APPEAL

from decision and order of Wisconsin Board of Tax Appeals dated February 13, 1942, confirming and modifying additional assessments with respect to dividends paid by Minnesota Mining & Mfg. Co. between Jan. 2, 1936 to and including Dec. 19, 1940, inclusive.

To the State of Wisconsin, and Particularly to the Tax Commissioner and the Wisconsin Department of Taxation:

PLEASE TAKE NOTICE that Minnesota Mining and Manufacturing Company hereby appeals to the Circuit Court for

Dane County, Wisconsin, from the whole of the decision and order of the Wisconsin Board of Tax Appeals, which said decision bears date February 13, 1942, a copy of which decision is hereto attached and marked Exhibit "1" and is hereby referred to and made part of this notice.

This appeal involves an appeal from an order modifying and affirming three separate assessments,—one with respect to dividends paid by the corporation from the date of the enactment of the privilege dividend tax law to and including the year 1936, one with respect to dividends paid by the corporation during the year 1937, and one with respect to dividends paid by the corporation during the years 1938, 1939 and 1940 inclusive.

The Objections to Order and Decision and to Assessments

The objections to said order and decision and to the assessments made are as follows:

[fol. 200] (1) The assessments and decision are void and of no effect whatsoever by reason of the fact that the purported law on which said assessments and purported tax is based, as it was applied by the Wisconsin Tax Commission and the Wisconsin Department of Taxation, is unconstitutional both under the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1 of the Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10 of the Constitution of the United States of America; Article I, Section 9 of the Constitution of the State of Wisconsin; Article I, Section 12 of the Constitution of the State of Wisconsin; Article VIII, Section 1; Constitution of the State of Wisconsin; and Article IV, Section 1, Constitution of the United States of America.

(2) That said assessments are invalid, in that it is assumed that the dividends upon which the assessments were based included payment of Wisconsin earnings, when in fact the proof showed that Wisconsin earnings were not included.

(3) That assuming, but not admitting, that the law as applied to the dividends declared and paid by the Minne-

sota Mining and Manufacturing Company is valid, the method of computation used by the Wisconsin Tax Commission and the Department of Taxation as modified and confirmed by the Board of Tax Appeals is invalid and not in accordance with the law.

(4) That the additional assessments as confirmed are based upon computations predicated on presumptions contrary to the facts and not authorized or contemplated by the privilege dividend tax law.

[fol. 201] (5) That the assessments as modified and confirmed are improperly made, in that even assuming that the law could be applied to the dividends of the Minnesota Mining and Manufacturing Company in a constitutional manner, are invalid because the method of computation is erroneous.

(6) That if any portion of the assessments are valid, such assessments should not be subject to penalties and interest in view of various considerations apparent in the record in this case.

(7) That assuming, but not admitting, that the privilege dividend tax law is constitutional as applied to foreign corporations, and assuming further, but not admitting, that there are some Wisconsin earnings in a particular dividend, it is impossible to ascertain the amount of such Wisconsin earnings, if any, in such dividend as of a dividend paying date, and accordingly any conceivable jurisdictional basis for the imposition of any tax is wholly lacking.

(8) That if any part of the assessments are correct (which is denied), under the circumstances no penalties or interest are properly chargeable.

Statement of Ultimate Facts Upon Which Appellant Relies

From the record herein made before the Wisconsin Board of Tax Appeals it appears that the Minnesota Mining and Manufacturing Company is a corporation existing under the laws of the State of Delaware; Minnesota Mining and Manufacturing Company is also licensed to do business in the State of Wisconsin, and is also qualified and licensed to do business in many other states of the United States; Minnesota Mining and Manufacturing Com-

pany paid an income tax to the State of Wisconsin on its income, as required by the laws of Wisconsin, for the years 1935 to 1940; inclusive and for some years prior thereto.

[fol. 202] Minnesota Mining and Manufacturing Company presently is conducting, and during the years 1935 to 1940 inclusive and for many years prior thereto did conduct, a manufacturing business in the States of Minnesota, Wisconsin, Michigan and Ohio, and sells and has sold its products in several states in the Union and in foreign countries; that the Company owns a substantial amount of stock in corporations and has earnings accruing to it from royalties and receives interest from several federal securities owned by it.

The principal office for the transaction of the business of said appellant is in St. Paul, Minnesota, although a statutory office of the company is in Wilmington, Delaware. All meetings of stockholders and all meetings of directors during the years 1935 to 1940, inclusive, and for many years prior thereto, have been held in the State of Minnesota, and no meetings of directors or of stockholders have ever been held within the State of Wisconsin.

The Company has a factory at Wausau, Wisconsin, where it manufactures Colorquartz and ships all the products of said factory to Chicago or points east. The sales of such products are made from the Chicago office of the Company and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the Company and deposited by the Company in banks in St. Paul. At all times material hereto all books and records covering the Company's Wausau operations were kept in St. Paul; all wages of the Company's employees at Wausau were paid directly from St. Paul; the receipts from the sale of products from the Wausau factory of the Company are commingled with the earnings of the Company's factories in St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, and with dividends from companies in which the Company owns a substantial amount of stock and further commingled with earnings from doing business in foreign countries and with earnings from royalties and bonds owned by the Company, including United States government bonds. [fol. 203] The stock books of the Company are not held within the State of Wisconsin.

At directors' meetings held at the office of the Company in St. Paul, Minnesota, the following dividends were de-

clared payable and were thereafter paid to the common stockholders of the Company, other than payments on treasury stock, on the dates shown below:

Date Paid	Total paid to stockholders
January 2, 1936	\$215,209.83
April 1, 1936	216,009.72
July 1, 1936	287,782.00
October 1, 1936	335,863.50
December 22, 1936	624,396.50
March 31, 1937	383,892.00
June 29, 1937	479,865.00
September 29, 1937	575,838.00
December 30, 1937	719,797.50
March 29, 1938	384,504.00
June 28, 1938	384,504.00
September 29, 1938	384,504.00
December 21, 1938	576,656.00
March 30, 1939	480,630.00
June 28, 1939	480,630.00
September 27, 1939	624,819.00
December 20, 1939	720,945.00
March 28, 1940	576,756.00
June 27, 1940	576,756.00
September 29, 1940	576,756.00
December 19, 1940	576,756.00

Said dividends were paid pursuant to Section 34 of the Delaware Corporation Law, which is as follows:

"The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year."

and pursuant to subsequent section which provides:

"No corporation created under the provisions of this Chapter, nor the Directors thereof, shall pay dividends

upon any shares of the corporation except in accordance with the provisions of this Chapter."

[fol.204] Minnesota Mining and Manufacturing Company had substantial "net assets in excess of its capital", and pursuant to the Delaware Corporation Law it could not and did not pay its dividends out of Wisconsin income for the previous year or for any year.

The actual payment of said dividends was effected by the executive officers of the Company advising The First Trust Company of St. Paul that a dividend had been declared and remitting to the said The First Trust Company of St. Paul a single check in the aggregate amount of said dividend from the Company's general account which was on deposit in banks located without the State of Wisconsin; that the account out of which said dividends were paid was not an "earnings account" and in said account were assets of the corporation which represented working capital of the corporation, and in some instances, proceeds from the sale of fixed capital. During all of the years in question the gross assets of the Minnesota Mining and Manufacturing Company were far in excess of liabilities and capital. There is no separately identifiable fund out of which dividends are paid, and in fact Minnesota Mining and Manufacturing Company does not have intangible assets sufficient to equal the amount of surplus. Much of the surplus of the corporation, as well as capital of the corporation, is represented by physical assets located in other states.

The First Trust Company of St. Paul made the actual payment to stockholders and issued checks in the respective amounts due for dividends on the respective dates in question, and caused the same to be placed in envelopes addressed to each stockholder at his address, and duly mailed in the United States mails, as the same appeared from the records of the Company upon the date fixed by the Directors of the Company as the date on which dividends would be paid; that no act in connection with the payment of said dividends was performed within the State of Wisconsin, and no act in connection with the receipt of said dividends was performed within the State of Wisconsin, except that a comparatively few stockholders of the [fol.205] Company reside within the State of Wisconsin and receive their checks by mail; that compliance with the

privilege dividend tax law would require an additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record and in the issuance of checks therefor, and would require the payment of an extra amount to The First Trust Company of St. Paul in making computations and deductions from the dividends so paid, since the deductions of the amount would necessarily increase the work considerably. While it is impossible to itemize the cost of such compliance, it is apparent that considerable expense will be entailed. It is further apparent that if the Minnesota Mining and Manufacturing Company were to deduct the amount of the alleged tax from each of the stockholders to whom payment of a dividend might be made, that it would be impossible by reason of the odd amounts to be deducted from dividends paid to various stockholders to deduct the exact amount of tax due from each dividend paid. Minnesota Mining and Manufacturing Company has not deducted any portion of the alleged tax from dividends paid to its stockholders, by reason of the fact that Minnesota Mining and Manufacturing Company has contended and does contend that the law under which the alleged tax has been levied, as administered by the Wisconsin Tax Commission and the Wisconsin Department of Taxation, is unconstitutional under the Constitution of the State of Wisconsin and the United States Constitution, all for the reasons more particularly hereinafter set forth, and further that the Wisconsin privilege dividend tax law does not apply to the transactions involving the declaration of dividends by appellant involved in this appeal.

[fol. 206] The assessments as modified and confirmed by the Wisconsin Board of Tax Appeals are erroneous, in that it is assumed that the dividends upon which the tax was based were paid out of Wisconsin earnings. This assumption is not based on facts inasmuch as any earnings from Wisconsin had lost their identity in all respects prior to the declaration of the dividend. Further, the dividend policy of the Company had no direct relationship of any kind or nature to Wisconsin earnings, and in attempting to determine the percent of dividend declared and paid out of income derived from property located and business transacted in Wisconsin the Department has assumed, without sufficient facts for such assumption, that such divi-

dends are declared partly out of Wisconsin earnings, when in fact they were declared out of "net assets of the corporation in excess of its capital" which had acquired a situs outside of the State of Wisconsin for a time substantially prior to the date of declaration of the dividends in question.

Introduced at the hearing before the Board of Tax Appeals was a statement of appellant's assets and liabilities in use at its Wausau, Wisconsin, operations for all years in question (Exhibit 15), which is referred to herein by way of reference. From this statement it is apparent that it would be impossible for the appellant to declare and pay dividends out of Wisconsin earnings, the reason being that all earnings since the inception of Wisconsin business in 1930 have been used to purchase real estate, buildings, machinery and inventories in connection with the Wausau plant (the only operation in Wisconsin) and that it has been necessary for the corporation from time to time to advance money from its principal office at St. Paul to help finance the building program of the Wisconsin branch of the business, and that accordingly no dividends have been paid out of Wisconsin earnings.

[fol. 207] That in the computation of the various assessments as confirmed by the Board of Tax Appeals it is assumed that all payments of dividends made in any calendar year are in fact made from surplus as of December 31st of the prior calendar year; that such is not the fact, but that payments are hereinbefore set forth were made pursuant to the Delaware law; that accordingly the assessments from which this appeal is taken are based upon certain arbitrary presumptions not in accordance with the facts and not contemplated by the privilege dividend tax law; that the assessments are erroneous because the theory in computing the assessments has assumed that the dividends were paid out of surplus and that there were Wisconsin earnings in surplus. Such assumption is contrary to the facts because under the Delaware Corporation Law dividends are paid out of its "net assets in excess of capital". There is, however, no segregation of such assets; all assets are mingled and not separately identified as capital or surplus or sums allocated to the payment of indebtedness. Furthermore, it is impossible to identify Wisconsin earnings. Such earnings can not

retain their Wisconsin connection after obtaining situs elsewhere. Wisconsin earnings as such do not enter into dividends declared and paid by the appellant. There are no further presumptions in the Wisconsin privilege dividend tax law other than the presumption that the dividends are paid out of earnings of the prior year, which presumption in the instant assessments has been specifically rebutted, there being no further presumption other than that rebutted and there being no other statutory formula by which the portion, if any, of any dividend allocable to Wisconsin can be ascertained, no tax can be levied unless the dividend allocable to Wisconsin income (if any) can actually be traced and segregated. *J. C. Penney Co. -v- Wis. Tax Comm.*, 238 Wis. 69; *Dravo Contracting Co. -v- James*, 114 Fed. (2d) 242, and cases there cited; that it is impossible to trace Wisconsin earnings of income [fol. 208] as such into the dividends in question, and since no method of apportionment of dividends between taxable and non-taxable part is provided by the statute and a physical separation is not possible, the State of Wisconsin is without power to levy any tax whatsoever. Apportionment being a legislative function is not one which the Department of Taxation or the Board of Tax Appeals or the courts may exercise in the absence of statutory provisions. Accordingly, there is no basis for any imposition of any tax of any kind or nature upon the appellant.

In the computation of the tax as confirmed, as hereinbefore stated, it is assumed that the dividends were paid from a fund existing at the end of the calendar year prior to their declaration, rather than that existed at the date of declaration or payment of the dividends in question; that such assumption so made in computing the assessments is not in accordance with the facts.

That the Minnesota Mining and Manufacturing Company made full disclosure of all income received by it, and full disclosure of all dividends paid by it since the passage of the privilege dividend tax law.

Propositions of Law Relied upon by Appellant

(1) That by reason of the facts above stated the transaction upon which the privilege dividend tax is attempted to be imposed in respect to the Minnesota Mining and

Manufacturing Company are wholly outside the jurisdiction of the State of Wisconsin, with the exception of the transfer of the dividends by the Company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly without the jurisdiction of said State. To the extent that the privilege dividend tax is attempted to be imposed on transactions wholly outside of the jurisdiction of the State, it [fol. 209] is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the state, under Article I, Sections 1 and 9 of the Wisconsin Constitution and under the Fourteenth Amendment of the Constitution of the United States.

(2) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of their liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders; although such income is not earned within the State of Wisconsin nor derived from property or business conducted within the State of Wisconsin, and in that it imposes upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay and withhold the tax.

Although the privilege dividend tax makes the stockholder ultimately liable for the tax, the Company, nevertheless, has legal standing to object to the validity of the law for the reason that, if the aforesaid privilege dividend tax law is unconstitutional, the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

[fol. 210] (3) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the

rights of the Minnesota Mining and Manufacturing Company and of its stockholders under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of Delaware and exercised pursuant to the laws of said state.

(4) That the aforesaid privilege dividend tax law is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside Wisconsin, because it is in effect a tax upon stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside the jurisdiction of the State; and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders residing outside the State of Wisconsin of liberty and/or property without due process of law in violation of the provisions of the Constitution of the State of Wisconsin.

(5) That the aforesaid privilege dividend tax law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders residing outside Wisconsin; and to restrict the application of the law to dividends paid by Wisconsin corporations, or dividends paid by foreign corporations to stockholders residing in Wisconsin, would be a denial of equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of the State of Wisconsin. Further, to so restrict [fol. 211] the application of the law would be to impose a tax which the Legislature of the State of Wisconsin did not intend to impose, since notwithstanding the provisions of the Laws of 1935, Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin, and that to so restrict the act would be to defeat the obvious intention of the Legislature.

(6) That the aforesaid privilege dividend tax law is unconstitutional and void under Article I, Section 10 of the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of the contract between the stockholders and the Company under the corporate charter and dividend resolutions by which the stockholders received a right to dividends.

(7) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, in that it deprives them of their liberty and/or property without due process of law because it imposes upon such stockholders in effect a tax on income which was earned by the Minnesota Mining and Manufacturing Company without the State of Wisconsin; all in violation of Article I, Sections 1 and 9 of the Wisconsin State Constitution and the Fourteenth Amendment to the Constitution of the United States.

(8) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders because it imposes in effect a state tax upon federal instrumentalities and the interest derived therefrom, in Article I, Section 8, Par. 2 of the Constitution of the United States.

[fol. 212] (9) That if any jurisdiction exists in favor of the State of Wisconsin to impose any tax upon the transaction of declaring and paying dividends, it exists only with respect to such portion of the dividends as are allocable to Wisconsin earnings, and that the record shows that no Wisconsin earnings constituted any portion of the dividends on which the assessments were made and accordingly the assessing authorities and the Board of Tax Appeals had no right to assess any tax.

(10) That on the basis of the assessments as confirmed by the Board of Tax Appeals the computation of the tax is based upon an alleged surplus analysis as of December 31st of the year preceding the date of the declaration of the dividends; that it is obvious that if there were any Wisconsin earnings contained in the dividends so

declared, that the only date which could be important for the determination of such portion would be the date of the declaration of the dividend rather than December 31st of the year before; that it is admittedly impossible to analyze the surplus account as of the date of declaration of the dividend, and the State of Wisconsin has no right of any kind or nature to impose any tax until it is determined that there are Wisconsin earnings in any dividend declared and until there is determined the amount of Wisconsin earnings in any such dividend, and this it is impossible so to do. Accordingly, the method of computation used by the assessing authorities as confirmed by the Board of Tax Appeals is wholly erroneous, and the assessments are void.

(11) That in the modified assessments as confirmed by the Board of Tax Appeals in computing the alleged portion of Wisconsin income in surplus the taxing authorities use as a numerator the total alleged Wisconsin income in surplus over total alleged surplus as a denominator, rather than alleged Wisconsin earnings for any particular [fol. 213] year over total surplus. Such a formula is neither contemplated by the act nor is it constitutionally valid. As a result of the use of this formula an attempt is made to levy a tax upon dividends allegedly paid out of earnings derived many years prior to the effective date of the privilege dividend tax law, and the effect of such a formula renders the law as applied unconstitutional under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin, and further void under Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States.

(12) That if the assessments as made were contemplated by the law, then and in that event the law is unconstitutional as impairing the obligation of contract between the appellant and the stockholders, in violation of Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States, and further would deny the full faith and credit to the laws of the States of Delaware and Minnesota and the corporate charter, by-laws and resolutions of the appellant,

in violation of Article IV, Section 1 of the Constitution of the United States.

(13) That the assessments are invalid because based on presumptions invoked contrary to the facts and without statutory authority, and not authorized by law.

(14) Under Subsection 2 of the Privilege Dividend Tax Law the appellant is required to deduct and withhold the amount of the tax from the dividends payable, and remit the tax so held to the State. The dividends with reference to which the taxes here involved are sought to be imposed were paid several years ago. At the time of their payment there was no standard in existence for the calculation of the tax. At that time the State Tax Commission [fol. 214] insisted that a method of computation be followed, which has since been held incorrect by the Supreme Court of the State of Wisconsin. The appellant obviously was not warranted in computing the tax in an incorrect manner and deducting it. Yet it was given no correct method for making the necessary computation. The time for deduction is now past and the law gives the appellant no authority to deduct the tax from dividends other than those to which it is applicable. Furthermore, the stockholders of the appellant are a changing body. Under the circumstances it is contrary to the statutes itself, as well as unconstitutional both under the State and Federal Constitutions, to penalize appellant as a collecting agent and to hold it liable because it did not collect the tax from the stockholders. If a corporation is impressed as a collecting agent it must be given instructions with reference to collection of the tax which may be reasonably followed, and in the instant case there was complete failure of the law and the Wisconsin Tax Commission to so do.

(14) That the imposition of penalties and interest on the assessments as confirmed are unlawful in view of the fact that it is absolutely impossible, even under the theory adopted by the taxing authorities and as confirmed by the Board of Tax Appeals, to make computation of the tax and payment thereof within the time contemplated by the law. To impose penalties and charge interest under the circumstances violates Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Four-

teenth Amendment of the Constitution of the United States, and is not contemplated by the applicable statutes under the circumstances existing in this case.

(15) Construed as a corporate income tax the privilege dividend tax is unconstitutional under the Wisconsin Constitution for the reasons set forth in the opinion of the [fol. 215] Supreme Court of Wisconsin in *J. C. Penney Co. v. Wis. Tax Comm.*, 238 Wis. 69.

The appellant herein has availed itself of the remedies provided by the statutes of the State of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

Minnesota Mining and Manufacturing Company,
Appellant. By H. P. Buetow. (Seal.)

John L. Connolly, 791 Forest St., St. Paul, Minn.,
and Ela, Christianson & Ela, 1 W. Main St., Madison, Wis., Attorneys for Appellant.

[fol. 216] IN CIRCUIT COURT OF DANE COUNTY

MINNESOTA MINING AND MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

Before Hon. Alvin C. Reis, Judge

DECISION—August 14, 1942

BY THE COURT:

This is a dividend tax case, companion to *International Harvester Company v. Wisconsin Department of Taxation*, decided this date.

Appellant herein raises a further issue. One of its officers testified before the Board of Tax Appeals, there were "no dividends declared out of profits earned in Wisconsin because the earnings were all used to expand the business in Wisconsin."

The appellant's position is expressed at pp. 26-27 of its brief, referring to Exhibit 15 before the tax body:

"This exhibit and the testimony with respect thereto, we submit, conclusively proves that all Wisconsin earnings,

plus additional advances from St. Paul, come back to Wisconsin operations and are represented primarily in capital investments in the form of physical assets. As such obviously these Wisconsin earnings were not and could not be available for the purpose of paying dividends. * * * Exhibit 15 reflects conclusively that in each year since the appellant has been in Wisconsin to and including 1940, the total advancements from St. Paul at all times has substantially exceeded the amount repaid to the home office in St. Paul out of Wisconsin income. In short, Wisconsin income has never been used for the purpose of paying dividends."

[fol. 217] We do not believe that the company's argument is logical. The fact that the company increased its capital investment in Wisconsin, does not destroy the further fact that its Wisconsin income went into the common surplus and increased generally the corporation's dividend potentialities to the extent of that contribution. If it had lost money in Wisconsin, there is nothing to indicate that its capital assets in the state would have been affected. Therefore, the profit realized in Wisconsin places the aggregate corporate surplus just that much ahead.

Upon all other issues, the reasoning and factual background set out in our opinion in the International Harvester case this date are applicable, *mutatis mutandis*, to the situation of Minnesota Mining and Manufacturing Company.

We, of course, can not waive statutory penalties and interest, as the present appellant requests.

The Attorney General may prepare and submit to appellant's attorneys the order and judgment affirming the decision and order of the Board of Tax Appeals.

Dated August 14, 1942.

[fol. 218] IN CIRCUIT COURT OF DANE COUNTY

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

VS.

WISCONSIN DEPARTMENT OF TAXATION, Respondent

JUDGMENT—September 2, 1942

The above proceeding commenced by the Minnesota Mining & Manufacturing Company, a Delaware corporation, pursuant to the provisions of sec. 73.015 Wis. Stats. 1941, to review the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942 modifying, and affirming as so modified, three additional assessments of the Wisconsin Privilege Dividend Taxes against said Minnesota Mining & Manufacturing Company, one for the year 1936, the second for the year 1937 and the third for the years 1938 to 1940, inclusive, having been heard before the Court on the record made before the Wisconsin Board of Tax Appeals in accordance with the provisions of sec. 73.015 (5) Wis. Stats. 1941, Ela, Christianson & Ela of Madison, Wisconsin by G. Burgess Ela, and John L. Connolly of St. Paul, Minnesota, appearing for the appellant Minnesota Mining & Manufacturing Company and John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General appearing for the respondent, and the Court, after hearing the arguments of counsel, reading the briefs submitted, and fully considering the case, having rendered a written opinion dated August 14, 1942, and entered an order directing the entry of judgment affirming the said additional assessments as modified, and affirmed as so modified, by the said decision [fol. 219] and order of the Wisconsin Board of Tax Appeals, and confirming the said decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942; and

Notice of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining & Manufacturing Company, on motion of John E. Martin, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General,

It Is Hereby Ordered And Adjudged that the three additional assessments of privilege dividend taxes against

the Minnesota Mining & Manufacturing Company, a Delaware corporation, one for the year 1936, the second for the year 1937 and the third for the years 1938 to 1940, inclusive, as modified, and affirmed as so modified, by the decision and order of the Wisconsin Board of Tax Appeals dated February 13, 1942, be and the same are hereby affirmed; and

It Is Hereby Further Ordered And Adjudged that the decision and order of the Wisconsin Board of Tax Appeals, dated February 13, 1942, modifying, and affirming as so modified, the said three additional assessments of privilege dividend taxes against the Minnesota Mining & Manufacturing Company, a Delaware corporation, be and the same hereby is confirmed in all respects; and

It Is Hereby Further Ordered And Adjudged that the respondent, Wisconsin Department of Taxation have and recover of the appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation, the sum of — Dollars (\$—) costs, (Balance of unpaid clerk's fees to be taxed and inserted herein, if not paid by the said [fol. 220] appellant.)

Dated at Madison, Wisconsin this 2 day of September, 1942.

By the Court. (Signed) Alvin C. Reis, Circuit Judge.

Notice of application for the entry of judgment in the above entitled proceeding in the form and content above is hereby expressly waived.

Dated September 2, 1942.

John L. Connolly and Ela, Christianson & Ela, by
Ela, Christianson & Ela, Attorneys for Appellant,
Minnesota Mining & Manufacturing Company.

[fol. 221] IN SUPREME COURT OF WISCONSIN.

EXCERPTS FROM APPELLANT'S BRIEF

1. Is the Wisconsin Privilege Dividend Tax Law, as applied by the Wisconsin Department of Taxation in making the additional assessments in question against a

foreign corporation on the so-called "surplus analysis" theory, constitutional under the due process and contract clauses of the Wisconsin Constitution and the Federal Constitution, and under Article VIII, Section 1 of Wisconsin Constitution?

The Wisconsin privilege dividend tax as applied by the Department of Taxation in making the assessment in question is unconstitutional under both the State and Federal Constitution. (Article I, Sections 1 and 9, and Article VIII, Section 1, of State Constitution and 14th Amendment to Constitution of United States.)

If any tax can validly be assessed, the tax in the instant case was improperly computed, if the law is construed to permit assessment as made, it is vulnerably retroactive and unconstitutional under the due process clauses of both State and Federal Constitutions.

[fol. 222] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 10,
1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by John L. Connolly, Esq., and E. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, J. Ward Rector, Esq., Assistant Attorney General, and Richard H. Teschner, Esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 223-224] IN SUPREME COURT OF WISCONSIN

Opinion by Justice Wickhem

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign
corporation, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent.

JUDGMENT—June 16, 1943

This cause came on to be heard on appeal from the order and judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order and judgment of the Circuit Court of Dane County, appealed from in this cause, be, and the same are hereby, affirmed.

Justice Barlow took no part.

[fol. 225] IN SUPREME COURT OF WISCONSIN

January, 1943, Term—No. 57

MINNESOTA MINING & MANUFACTURING COMPANY, Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION, Respondent.

This is an appeal from an order and judgment of the Circuit Court for Dane County, Alvin C. Reis, Circuit Judge. *Affirmed.*

Appeal to the Circuit Court for Dane County from an order of the Wisconsin Board of Tax Appeals which had affirmed an additional assessment of privilege dividend taxes against appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation. The order of the Wisconsin Board of Tax Appeals was dated February 13, 1942, and the order and judgment of the Circuit Court were made and entered on September 2, 1942. The material facts will be stated in the opinion.

OPINION—Filed June 16, 1943

[fol. 226] WICKHEM, J.:

The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its

principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay rolls, together with pay checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equaling the amount of the pay roll is forwarded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay roll are forwarded. The company reports upon a calendar-year basis, closing books as of December 31st, each year. It maintains one general surplus account and none of the earnings from property located or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the board of directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

Sec. 34, Delaware Corporation Law, empowers corporations to declare and pay dividends either out of net assets in excess of its capital, or out of net profits for the fiscal year then current "and/or" the preceding fiscal year.

In making the assessments the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining, (1) total surplus existing at that time; (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it [fol. 227] being the view of the department that unless the

corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend-paying date. The dividends were paid out of the corporation's general account. There never was any attempt made to earmark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union.

Such contentions by appellant as question the constitutionality of the privilege dividend tax as applied by the Department of Taxation are sufficiently answered by the opinion in *International H. Co. v. Department of Taxation*, (*ante*, p. 198, 9 N. W. (2nd) 000.) We proceed, therefore, to deal with contentions peculiarly applicable to this case.

Appellant contends that the department has not analyzed the surplus of appellant as of the date of the payment of the dividend. The record shows that dividends were paid on December 7, 1936, December 10, 1937, December 12, 1938, December 21, 1939, and December 10, 1940. The department analyzed appellant's surplus as of December 31, 1935, 1936, 1937, 1938, and 1939, respectively, for the reason that the corporation closed its books and took inventory as of those dates. We see no objection to this method. It is the same basis upon which the dividend was declared, namely, the ascertained surplus of the corporation available for dividends. We are not persuaded that there is anything jurisdictionally or procedurally lacking in a method of computation which follows the ordinary course of business adopted by the corporation itself in voting its dividend. Aside from this, there is a strong inference that dividends are paid out of assets ascertained to be available for this purpose. The normal corporate procedure is to use the last annual inventory and closing of the books to furnish the information, and the dividend is customarily based on the situation thus disclosed. If some accurate method is in use in a particular case to disclose the general corporate situation as of the time of the dividend, it is for the corporation to show this, and if satisfactorily shown, it is proper for the department to use this as a basis for the tax.

It is next contended that no Wisconsin income was used in the payment of dividends, because the record demonstrates that all Wisconsin income was reinvested in physi-

cal assets of the corporation in Wisconsin. This contention misses the point. It seems to us that it can make no possible difference what is done with the particular money earned in Wisconsin so long as the earnings go to swell the total assets of the corporation. To the extent that they do this, and increase the margin of assets over liabilities, including capital, they are a proportional part of the funds available for dividends. None of the Wisconsin earnings are earmarked. According to the record, they are turned in to the home office, and reinvested in physical assets located in Wisconsin. This does not repel the inference that Wisconsin net earnings are a part of the funds out of which dividends are declared and paid.

[fol. 228-229] It is finally contended that even if the assessments are held valid or partially valid, penalties and interest should not be imposed. We find the statutory requirements entirely clear and unambiguous upon this point, and there is no attack upon the validity of the provisions. Hence, we can only paraphrase what was said by this court in *State v. Baker*, 232 Wis. 383, 396, 286 N. W. 535, (287 N. W. 690,) that despite the urge to find a way to avoid the imposition of penalties, "We are bound by the clear unambiguous language of the statute and cannot by judicial construction introduce into them provisions and remedies which do not exist." See in this connection *Laabs v. Tax Comm.*, 218 Wis. 414, 261 N. W. 404; *State ex rel Crucible S. C. Co. v. Wis. Tax Comm.*, 185 Wis. 525, 201 Wis. 764.

By the Court.—Order and judgment affirmed.

BARLOW, J., took no part.

[fol. 230] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed July 3, 1943

Now comes the Minnesota Mining and Manufacturing Company, by Ela, Christianson & Ela, its attorneys, and respectfully moves the Court for a rehearing of the decision and mandate of the court filed herein on the 16th day of June, 1943.

The reasons in support of this motion will be submitted on printed arguments, as provided by the rules of practice of this court.

Dated, July 3rd, 1943.

Ela, Christianson & Ela, Attorneys for Appellant.

[fol. 231] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER RETAINING RECORD—July 3, 1943

The said appellant having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fols. 232-233] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—September 14, 1943

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with \$25.00 costs.

[fols. 234-235] IN SUPREME COURT OF WISCONSIN

[Title omitted]

OPINION ON REHEARING—Filed September 14, 1943

Wickhem, J. on re-hearing:

The Court has thoroughly considered the motions for rehearing filed herein and is not disposed to modify its views or to restate or amplify its opinion in any respect but one. In discussing the permissible retroactivity of

the privilege dividend tax and noting an equal division of the court upon that point, the opinion did not indicate whether the difference in view was based upon the constitution of the state of Wisconsin, the constitution of the United States of America, or both. It may be useful to state that the constitutionality of the law in this respect was considered under both; and the court was of the view that the same considerations governed whichever constitution was applied.

By the Court:—Motion for rehearing is denied, with \$25 costs.

[Vol. 236] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed January 21, 1944.

Now Comes the above named appellant pursuant to paragraph 9, rule 13 of the Rules of The Supreme Court and states that the points on which it intends to rely in this court in this case are as follows:

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935, and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, as applied to Minnesota Mining & Manufacturing Company and its stockholders under the existing facts was invalid as in conflict to the Fourteenth Amendment to the Constitution of the United States of America as imposing a tax beyond the taxing jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that the assessments of taxes involved in this proceeding pursuant to the provisions of Section 3, Chapter 505, Wisconsin Session Laws, 1935, as amended by Chapter 552, Wisconsin Session Laws, 1935 and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937 and Chapter 198 of Wisconsin Session Laws, 1939, against the Minnesota Mining & Manufacturing Company, [fol. 237] a Delaware corporation, under the existing facts,

constituted a deprivation of property of Minnesota Mining & Manufacturing Company and its stockholders without due process of law and beyond the taxing power of the State of Wisconsin and therefore invalid as violative to the Fourteenth Amendment to the Constitution of the United States of America.

(3) The Supreme Court of Wisconsin erred in failing to hold (split decision of State Supreme Court three to three which by rule of Wisconsin Supreme Court affirmed the trial court's decision) that Section 3, Chapter 505, Wisconsin Session Laws, 1935, (as amended by Chapter 552, Wisconsin Session Laws, 1935), and as extended in operation by Chapter 309, Wisconsin Session Laws, 1937, and Chapter 198 of Wisconsin Session Laws, 1939, so far as it purports to reach Wisconsin earnings of Minnesota Mining & Manufacturing Company without reference to the year in which they were earned, and for many years prior to the enactment of the law and from the time the corporation first operated in Wisconsin, are invalid as depriving the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and therefore to this extent invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

The appellant further states that the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

<i>Title of paper</i>	<i>Record page</i>
Order Allowing Appeal and Fixing Bond	1
Petition for Allowance of Appeal, Assignments of Error and Prayer for Reversal	2-5
Statement as to Jurisdiction	6-57
[fol. 238] Service of Appeal	63
Affidavit of Service	65
Motion to Dismiss Appeal or Affirm	67
Appellee's Statement Opposing Jurisdiction	68-83
Praecipe	84-85
Pleas, Wisconsin Supreme Court	86
Notice of Appeal to Wisconsin Supreme Court	87

<i>Title of paper</i>	<i>Record page</i>
Part of the Transcript of Testimony Before the Wisconsin Board of Tax Appeals	88-135
That part of Exhibit I contained from page 139 to page 160 of the record	139-160
Exhibit 5, Second Revised Computation of Taxes for 1935-1936	161-168
Exhibit 9, Second Revised Computation of Taxes on Dividends for 1937	169-176
Exhibit 13, Second Revised Computation of Taxes on Dividends for 1938-1940	177-184
Part of the Stipulation of Facts, being Exhibit 14 (R. 185-193), excluding therefrom the dividend-resolutions of March 10, 1936 (appearing at R. 188 of the record), and the further resolutions of June 17, 1936, September 22, 1936, December 7, 1936, March 9, 1937, June 19, 1937, September 17, 1937, December 10, 1937, March 8, 1938, June 8, 1938, September 19, 1938, December 12, 1938, March 14, 1939, June 19, 1939, September 18, 1939, December 2, 1939, March 19, 1940, June 18, 1940, September 17, 1940 and December 10, 1940, as contained from page 188 of the record to page 193 of the record with a notation that these are omitted from the printed record because they are substantially the same as the December 16, 1935 dividend resolution	185-188 and part of 193
Decision and Order of Wisconsin Board of Tax Appeals	194-198
Notice of Appeal from Board of Tax Appeals to Dane County	199-215
Decision of Circuit Court of Dane County	216-217
Judgment of Circuit Court of Dane County	218-220
Excerpts from Appellee's brief in Wisconsin Supreme Court	221
[fol. 239] Argument, Wisconsin Supreme Court	222
Judgment, Wisconsin Supreme Court	223
Opinion, Wisconsin Supreme Court	224-228
Motion for Rehearing, Wisconsin Supreme Court	229-230
Order Retaining Record	231

<i>Title of paper</i>	<i>Record page</i>
Order Denying Motion for Rehearing	232
Opinion on Rehearing, Wisconsin Supreme Court	233-234

Respectfully submitted, John L. Connolly, G. Burgess Ela, Counsel for Appellant.

Service of the foregoing statement and designation is hereby admitted this 15 day of January, 1944.

John H. Martin, Attorney General for the State of Wisconsin, Ward Rector, Deputy Attorney General for the State of Wisconsin, Harold H. Persons, Assistant Attorney General for the State of Wisconsin, Attorneys for Appellee. By Harold H. Persons, Assistant Attorney General.

[fol. 240] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—February 28, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, a probable jurisdiction is noted.

Endorsed on Cover: File No. 48,114. Wisconsin Supreme Court, Term No. 621. Minnesota Mining and Manufacturing Company, Appellant, vs. Wisconsin Department of Taxation. Filed January 21, 1944. Term No. 621 O.T. 1943.